TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 19[illegible]

No. [illegible] 7.

ROYAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT MILLER, SPECIAL MASTER OF THE CAJA DE AHORROS, AND LUCAS AMADEO

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED NOVEMBER 10, 1903.

(19,134.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

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1 At a regular term of the district court of the United States within and for the district of Porto Rico began and held at the city of Ponce, in said district on the second Monday in May being also the 11th day of that month in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America the one hundred and twenty seventh

Present: The Hon. Wm. H. Holt, judge.

Among the proceedings had were the following, to wit:

ROBERT A. MILLER, Special Master,
vs.
THE ROYAL INSURANCE COMPANY OF LIVERPOOL, a Corporation. } C. L. #113.

Assumpsit. Damages, $30,000.

Be it remembered that, heretofore to wit: on the 23rd day of April A. D. 1902, came the plaintiff by his attorney and filed in the clerk's office of said court a declaration in this cause, which said declaration is clothed in the words and figures following, to wit:

In the United States District Court for Porto Rico.

ROBERT A. MILLER, as Special Master,
against
THE ROYAL INSURANCE COMPANY OF LIVERPOOL, a Corporation.

Action of assumpsit. Damages, thirty thousand dollars.

Robert A. Miller, as special master by his attorney Charles M. Boerman complains of the Royal Insurance Company of Liverpool a foreign corporation organized under the laws of England and doing business in Porto Rico of a plea of trespass on the case
2 on promises: for that whereas the defendant on or about the fifteenth of September 1884 in Porto Rico made a policy of insurance and delivered the same to Antonio Amadeo of Quebradas Arenas, Maunabo Porto Rico, and for the consideration therein expressed and to it paid promised the said Amadeo in the terms of the said policy and the considerations thereto annexed to pay to him sixteen hundred pounds sterling, a sum of money equivalent to eight thousand dollars, U. S. currency, which said policy and conditions here follow in words and figures as follows:

"Porto Rico, Messrs. Feddersen & Co., agents.

"R. Brocklebank, Esq., chairman; G. H. Horsfall, Esq., deputy chairman; T. D. Hornby, Esq.; J. Barrow, Esq.; C. J. Bushell, Esq.; William Cliff, Esq.; D. Ducan, Esq.; Thos. H. Ismay, Esq.; D. Hardine, Esq.; W. S. Jarrow, Esq.; E. W. Rainer, Esq.; manager, John H. McLaren, Esq.

"The Royal Insurance Company of Liverpool.

"Capital, two millions sterling.

"Policy number, "2,647,851. Premium, £20. Sum insured, £1,600.

"This policy of insurance witnesseth, that Antonio Amadeo, Esq., "estate ownwer, of Quebrada Arenas, Maunabo P. R. (hereinafter "called the insured) having paid to the undersigned as authorized "agents of 'the Royal Insurance Company' (hereinafter called the "company) the sum of twenty pounds sterling for insuring against "loss or damage by fire as hereinafter mentioned, the property "hereinafter described, in the sum or several sums following, viz:—

"£1600—say sixteen hundred pounds sterling, on stock of sugar "and molasses, the estate 'Quebrada Arenas' situated in the dis- "trict of Maunabo, which manufactory is constructed of wood, cased "with zinc roofed with zinc 25 % the building itself being insured "in the Northern Assurance Company for £2400.

"The company hereby agree with the insured but subject to the "conditions on the back here*by* which are to be taken as part of "this policy that if the property above described or any part
3 "thereof, shall be destroyed or damaged by fire, at any time "between the nineteenth day of November 1884, and four "o'clock in the afternoon of the nineteenth day of November 1885, "the company will, out of their capital, stock, and funds, pay or "make good to the insured the value of the property so destroyed, "or the amount of such damage thereto, to an amount not exceed- "ing in respect of each or any of the several matters above specified, "the sum set opposite thereto respectively and not exceeding in the "whole the sum of sixteen hundred pounds sterling and also not "exceeding in any case the amount of the insurable interest therein "of the insured at the time of the happening of such fire.

"In witness whereof, we, two of the directors of the said com- "pany, by our authorized agents, have hereunto set our hands, and "have caused the common seal of the said company to be hereunto "affixed.

"Dated at Porto Rico, this fifteenth day of September in the "year of our Lord one thousand eight hundred and eighty-four and "issued there.

"Examiner, R. BROCKLEBANK,
"Entered, E. W. RAYNER,
"*Directors*,
"By their attorneys, FEDDERSEN CO.,
"*Agents of the Company.*

"You are requested to examine the conditions of your policy, and "to observe that no policy is valid unless it bears the company's "seal, and has received the signatures of two directors by their "attorney or attorneys.

"The conditions referred to in this policy, are as follows:

"1. Any material mis-description of any of the property proposed "hereby to be insured or of any building or place in which prop- "erty to be so insured is contained, or any omission to state the "existence of any hazardous trade, or of any apparatus in or by "which heat is produced other than grates in common fireplaces "therein, and any mis-statement of or omission to state, any fact ma- "terial to be known for estimating the risk, whether at the time of "effecting the insurance or afterwards renders this policy void as to "the property affected by such mis-description, mis-statement, or "omission respectively.

4 "2. If after the risk has been undertaken by the company, "anything whereby the risk is increased be done to, in, or "upon, property hereby insured, or to upon, or in, any building or "place in which property hereby insured is contained, or if any "property hereby insured be removed from the building or place in "which it is herein described as being contained or if any addition "to the risk arise from any other cause whatsoever without in each "and every of such cases the assent or sanction of the company, "signified by endorsement hereon, or if the insured shall refuse or "neglect to pay any further premium which may be demanded in "consequence of any increase of risk, the insurance as to the prop- "erty thereby affected ceases immediately thereupon to attach. "And if by reason of such alteration or addition, or from any other "cause whatever, the company or its agents shall desire to terminate "the insurance affected by this policy it shall be lawful for the "company or its agents so to do, by notice to the insured, or his "representatives, and to require this policy to be given up for the "purpose of being cancelled provided that in any such case the "company shall refund to the insured a ratable proportion for the "unexpired time thereof of the premium received for the insurance.

"3. This policy does not cover property held in trust or commis- "sion unless expressly described as such; nor china glass, looking- "glasses, jewels, clocks, watches, trinkets, medals, curiosities, manu- "scripts prints, paintings, drawings, sculptures, musical mathemat- "ical and philosophical instruments, patterns, models and moulds "unless specially mentioned in the policy; nor deeds, bounds, bills "of exchange, promissory notes money, securities for money stamps "and books of account; nor gunpowder; nor loss or damage by fire "happening during the existence of any invasion, foreign enemy "rebellion, insurrection, riot civil commotion, military or usurped "powder, or martial law, within the country or locality in which "the property insured is situated unless proof be made to

5 "the satisfaction of the directors that such loss or damage "was not occasioned by, or connected with, but occurred from "a cause or causes independent of the existence of such invasion,

"foreign enemy, rebellion, insurrection, riot, civil commotion, mili-
"tary or usurped power, or martial law. And this policy does not
"cover loss or damage occasioned by or through any earthquake or
"hur-icane; or by or through the spontaneous fermentation or heat-
"ing of the subject insured; nor goods destroyed or damaged while
"undergoing any process by which the application of fire heat is
"necessary; nor loss or damage by explosion except loss or dam-
"age to a building or property contained therein caused by explo-
"sion of gas in such building, not being a building in which gas is
"manufactured.

"4. No insurance proposed to the company is to be considered in
"force until the premium be actually paid. No receipts for any
"premiums of insurance shall be valid or available for any purpose
"whatever except such as are printed and issued from the com-
"pany's office and signed by one of the clerks or agents of the office,
"and impressed with the seal of the company, and any condition or
"proviso contained in, endorsed upon, or referred to, in any such
"receipt shall be taken as part of this policy.

"5. This policy ceases to be in force as to any property hereby
"insured which shall pass from the insured to any other person
"otherwise than by will or operation of law, unless notice thereof be
"given to the company and the subsistence of the insurance in
"favor of such other person be declared by a memorandum en-
"dorsed hereon by, or on behalf of the company.

"6. On the happening of any loss or damage by fire to any of the
"property hereby insured the insured must forthwith give notice in
"writing thereof to the company and within fifteen days at latest
"deliver to the company as particular an account as may be reason-
"ably practicable of the several articles or matters damaged or de-
"stroyed by fire and also of all other articles and matters
6 "insured by this policy with the estimate value of each of
"them respectively having regard to their several values at
"the time of the fire; and also of the nature and amount of the loss
"or damage occasioned to each or any such articles or matter, and
"of the interest of the insured therein; and in support thereof give
"all such vouchers, proofs and explanations and other evidence as
"may be reasonably required by or on behalf of the company,
"together with, if required a statutory declaration of the truth of
"the account; and in default thereof, no claim in respect of such
"loss or damage shall be payable or sustainable unless and until
"such notice, accounts, proofs, and explanation or evidence respect-
"ively shall have been given and produced as aforesaid, and such
"statutory declaration, if required shall have been made.

"7. No profit nor advantage of any kind is to be included in any
"claim for loss or damage under this policy, and if the claim be in
"any respect fraudulent, or if any false statutory declaration be made
"or used in support thereof, or if the fire be occasioned by or through
"the procurement or with the knowledge or connivance of the in-
"sured, all benefit under this policy is forfeited.

"8. In case of damage by the removal of property to escape con-

"flagration, this company will contribute thereto in the proportion "the sum insured hereby shall bear to the whole value of such "property before removal; but the company shall not be held "liable for property stolen.

"9. The company may, if they think fit, at their option, reinstate, "or replace, the property damaged or destroyed, instead of paying "the amount of the loss or damage, and may join with any other "company or insurers in so doing in cases where the property is "also insured elsewhere.

"10. On the happening of any damage by fire to any building or "place or property or effects within any building or place, in respect
"of which a claim is, or may be made under this policy the
7 "company, without being deemed wrong-doers may by their
"authorized officers and servants, or others, enter into, and "for a reasonable time remain in possession of such building or "place, property or effects for all reasonable purposes relating to or "in connection with the insurance hereby effected, and this policy "shall be evidence of leave and license and authority for that pur- "pose.

"11. The insured must give notice to the company of any insur- "ance or insurances made elsewhere on the property hereby insured, "or any part thereof, the particulars of which must be endorsed on "the policy an- unless such notice be given and endorsement be made, "the insured will not be entitled to any benefit under this policy.

"12. If at the time of any loss or damage by fire happening to any "property hereby insured, there be any other subsisting insurance "or insurances whether effected by the insured or by any other per- "son, covering the same property this company shall not be liable "to pay or contribute in respect of such loss or damage more than "its rateable proportion of such loss or damage.

"13. In all cases where any other subsisting insurance or insur- "ances whether effected by the insured or by any other person on any "property hereby insured either exclusively or together with any "other property in and subject to the same risk only shall be subject "to average, the insurance on such property under this policy shall "be subject to average in like manner.

"14. If any difference shall at any time arise between the com- "pany and the insured, or any claimant under this policy, as to the "amount of any loss or damage by fire, and no fraud be alleged "every such difference, as and when the same arises shall be "referred to the arbitration and decision of two indifferent persons "one to be chosen by the party claiming and the other by the com- "pany; or in case of disagreement between them, then of an umpire "to be chosen by the arbitrators before entering on the reference "provided that if one of the parties fail to name an arbitrator "within ninety days after being called upon by the other party to do
"so, subsequently to the furnishing of the proofs and evidence
8 "and other matters as stipulated by the foregoing condition
"No. 6, then in such case shall the other party be at liberty "to choose both arbitrators, who shall agree upon an umpire before

"entering on the reference and the costs of the reference shall be in "the discretion of the arbitrators or umpire, as the case may be, who "shall award by whom and in what manner the same shall be paid; "and the decision of the arbitrators or umpire, as the case may be "shall be final and binding on all parties and this condition shall "be deemed and taken to be an agreement to refer as aforesaid. And "it is hereby expressly stipulated and declared that the obtaining of "an award by such a arbitrators or umpire as the case may be, shall "be a condition precedent to the liability or obligation of the com- "pany to pay or satisfy any claim under this policy for loss or "damage in respect of which any such difference may have arisen, "and to the enforcement of any such claim.

"15. In all cases where this policy is void, or ceases to be in forse "under any of the foregoing conditions, all monies paid to the com- "pany in respect thereof will be forfeited.

"16. The directors of the company shall not be sued, nor made "personally responsible for this insurance until the funds of the "company are first exhausted; and the agents shall in no case be "responsible, either on account of any legal or other investigation "which they may find it necessary to institute for the satisfaction of "the company; nor can their personal property be attached on ac- "count of any alleged loss by the insured.

"17. If in any case, the company shall be unable to reinstate or "to repair the buildings, because of any provisions in the acts in "force for regulating the alig-ment of streets, or the erection of build- "ings, the company shall in every such case, only be liable to pay "such sum as would be requisite to reinstate or repair such build- "ings if the same could lawfully be reinstate- to their former con- "dition.

"18. It is hereby declared and agreed that if the property
9 "covered by this policy shall, at the breaking out of any fire
"be collectively of greater value than the sum insured thereon, "then this company shall pay or make good such a proportion only "of the loss or damage as the sum so insured shall bear to the whole "value of the said property at the time when such fire shall "happen.

* * * * * * *

And the plaintiff avers upon information and belief that at the time of the making of said policy and from then until the happening of the loss and damage hereinafter mentioned said Amadeo had an interest in the said property to the amount of said sum insured subject however to a certain deed of mortgage or hypoteca executed by him on or about the nineteenth day of September 1884 to the Caja de Ahorros de la villa de Ponce, by which deed he mortgaged to the said Caja de Ahorros said property insured, together with the sums insured upon the said property by the defendant and the plaintiff upon information and belief further avers that on or about the 6th of February 1885 while so insured and while the said policy was in full force and effect the said property described in the policy

was consumed and destroyed by fire and the loss and damage thereby sustained amounted to the aforesaid sum insured, which said loss and damage did not happen by means of any invasion, insurrection, riot or civil commotion or of any military or usurped power or cyclon-, hur-ican- or earthquake or explosion fermentation or expontaneous heat. And the plaintiff upon information and belief further avers that forthwith after the happening of said loss and damage notice thereof was given to the defendant and that the defendant then absolutely refused to consider the claim and the plaintiff further avers upon information and belief that the property insured and specified by the said policy was not insured in any other company and that the said building in which the said property was situated was not at or since the time of the insurance appropriated, applied or used to, or for the purpose of carrying or exercising therein any trade business or vocation denominated hazarduos or extrahazarduos, or specified in the policy as
10 special rates.

And the plaintiff upon information and belief further avers that the sums of money due upon the said mortgage have never been paid to the said Caja de Ahorros and are still due, and he further avers upon information and belief that the said Caja de Ahorros de la villa de Ponce has been declared by a competent court a bankrupt to wit, by the court of first instance of Ponce and that trustees have thereupon been appointed in said bankruptcy proceedings and duly accepted such appointment and took charge of the assets of which the said mortgage upon the said property formed a constituent part, and that thereupon in the proceedings of creditors of the said Caja de Ahorros to wit: Norberto Castaing, Luis Lucca, Eduardo Lucca and José Vila against the said trustees to wit; Ernesto Morenglan, Augusto Pasarel and Francisco Becerra now pending in the United States district court for Porto Rico this plaintiff Robert A. Miller has been duly appointed by an order of the 24th of January 1901 a special master with the power and duty to collect judicially or extrajudicially all the assets of the said Caja de Ahorros de la villa de Ponce of which assets the sums due by the defendant herein for the insurance of said property form a part. And that in the proceedings to foreclose the said mortgage commenced by the plaintiff herein and pending in this court the said Antonio Amadeo has been absolutely foreclosed and debarred from all equity of redemption of in and to the mortgaged property and that the plaintiff hereby became invested with all the rights and interest of the said Antonio Amadeo in and to the said mortgaged property and entitled to collect the said sums due by the defendant herein on the insurance of the said property, for the benefit of the creditors of the said Caja de Ahorros.

And the plaintiff further avers upon information and belief that although the said Antonio Amadeo and his assignees heretofore mentioned have kept and performed all the things in the
11 said policy mentioned on their part to be kept and performed the defendant has not yet paid the said amount of the loss

and damage aforesaid or any part thereof but refuses to do so to the damage of the plaintiff of thirty thousand dollars therefore he brings his suit etc.

And the plaintiff brings into court the order aforesaid whereby it fully appears that the plaintiff is special master with the full powers above stated.

CHAS. BOERMAN,
Attorney for Plaintiff.

U. S. OF AMERICA,
District of Porto Rico, } *ss:*

Robert A. Miller under oath says that the foregoing declaration is true to his knowledge except as to matters stated to be alleged upon information and belief and as to those he believes it to be true.

ROBERT A. MILLER.

Sworn to before me this 23rd day of April, 1902.

A. AGUAYO,
Deputy Clerk, U. S. District Court.

And on the same day, to wit: the 23rd day of April, A. D. 1902, the plaintiff by his attorney filed in the clerk's office of the court aforesaid his certain præcipe for a writ of summons in this case, which said præcipe is in words as follows, to wit:

U. S. District Court for Porto Rico.

ROBERT A. MILLER, as Special Master,
vs.
ROYAL INSURANCE CO. } Assumpsit. Damages, $30,000.

The clerk will please issue a summons in the above entitled action on assumpsit.

C. M. BOERMAN,
Attorney for Plaintiff.

Thereupon there was issued out of the clerk's office of said court a certain writ of summons directed to the marshal of said district and against the said defendants, which said summons is in words and figures as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT A. MILLER, as Special Master,
vs.
ROYAL INSURANCE COMPANY OF LIVERPOOL. } Assumpsit. Damages, $30,000.

12 *Summons.*

UNITED STATES OF AMERICA,
District of Porto Rico, } *ss:*

The President of the United States of America to the marshal of the district of Porto Rico, Greeting:

You are hereby commanded to summon the Royal Insurance Company of Liverpool, if they can be found in your district, to be and appear before the United States district court for the district of Porto Rico at the court-rooms of said court in the city of Ponce on the 12th day of May 1902, then and there to answer unto Robert A. Miller special master on an action in assumpsit damages $30,000, *dollars*, and have you then and there this writ.

Failing to so appear judgement may be entered against the said defendant by default.

Witness, the Honorable Wm. H. Holt, judge of the district court of the United States for Porto Rico, this 23rd day of April A. D. 1902, and of the Independence of the United States of America the 126th.

Attest: RICARDO NADAL, *Clerk*,
By A. AGUAYO, *Deputy*.

And afterwards, to wit: on the 25th day of April in the year last aforesaid came the marshal of the said district to whom the said writ was in form aforesaid directed and returned the same into the clerk's office of the court aforesaid with his proceedings, endorsed thereon clothed in the words and figures following, to wit:

Return on Service of Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, } *ss:*

I hereby certify and return that I served the annexed writ on the therein-named The Royal Insurance Company of Liverpool, by handing to and leaving a true and correct copy thereof with N. Arsuaga a member of the firm of Sobrinos de Esquiaga, chief agents of the Royal Insurance Company of Liverpool within the district at San Juan P. R. in said district personally on the 24th day of April, A. D. 1902.

E. S. WILSON,
U. S. Marshal,
By H. H. HUBBARD, *Deputy*.

13 And afterwards, to wit: on the 12th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER
vs.
ROYAL INSURANCE COMPANY OF LIVERPOOL.

Now comes J. M. Keedy Esq. and enters his appearance as attorney for the defendant herein.

And on the same day in the year last aforesaid, came the defendant by its attorney and filed in the clerk's office of said court a demurrer in this case, which said demurrer is in words as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT A. MILLER, Special Master, etc.,
versus
THE ROYAL INSURANCE COMPANY OF LIVERPOOL.

Demurrer.

Now comes The Royal Insurance Company, defendant, by J. M. Keedy, attorney, and defends the wrongs and injuries when, etc. and says that the declaration and matters therein contained in manner and form as the same are therein stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against this defendant, the said Royal Insurance Company of Liverpool, and that the said defendant is not bound by the law of the land to answer the same.

Wherefore for want of sufficient declaration in this behalf said defendant prays judgement, and that the said plaintiff, Robert A. Miller, special master, aforesaid, may be barred from having or maintaining his aforesaid action against this defendant.

Wherefore the defendant prays to be dismissed with costs.

J. M. KEEDY, *Att'y.*

Subscribed and sworn to before me this 12th day of May, 1902.

RICARDO NADAL, *Clerk*,
By H. H. SCOUVILLE,
Deputy Clerk.

14 And on the same day, in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER
vs.
ROYAL INSURANCE COMPANY OF LIVERPOOL.

Case Submitted on Demurrer.

And afterwards, to wit: on the 14th day of May in the year last aforesaid came the defendant by its attorney and filed in the clerk's office of said court, a special demurrer in this case, which said demurrer is as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT A. MILLER, as Special Master,
vs.
THE ROYAL INSURANCE COMPANY OF LIVERPOOL. } No. 113,

Special Demurrer.

Now comes the defendant and for special demurrer to the declation herein filed and states that the declaration does not disclose the cause of action for the following reasons, to wit:

1st. For want of capacity in the plaintiff to sue.

2nd. The said declaration does not states sufficient facts to constitute a cause of action.

3rd. Because on the face of the declaration, the alleged claim is prescribed by the statutes of limitations.

Wherefore the defendant prays judgement of this court, whether it ought to further plead therein, and asks to be dismissed with its costs.

J. M. KEEDY,
Attorney for Defendant.

Thereupon came the plaintiff by his attorney and filed in the clerk's office of said court a joinder on demurrer in this cause, which said joinder on demurrer is as follows, to wit:

Joinder on Demurrer.

U. S. District Court for Porto Rico.

R. A. MILLER
vs.
ROYAL INS. CO.

And the plaintiff says that the said declaration and matters
15 therein set forth are in manner and form sufficient in law for him to have and maintain his action and he is ready to verify and proof the same.

Wherefore, inasmuch as defendant has not answered neither denied the declaration he prays judgement.

C. M. BOERMAN,
Plaintiff's Att'y.

And afterwards, to wit: on the 16th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
THE ROYAL INSURANCE COMPANY.

Opinion.

This action is upon a policy of fire insurance. It is submitted upon both special and general demurrer to the declaration. It is urged as ground for special demurrer that the plaintiff has not capacity to sue. The power was given him to do so by the order appointing him; this is averred in the declaration, and it is immaterial whether he is called a special master or receiver. Another ground is that it appears upon the face of the declaration the claim is prescribed by the limitation statute. It has been held by some courts that where from all that is averred in a declaration it not only appears the claim is barred by time, but that there exists no ground of exception taking it out of the statutes, it is as a matter of law prescribed and therefore a demurrer, which can present only an issue of law, will reach it. But even this does not appear in this case even if the court were to follow this by no means universal precedent. As — rule when limitation is relied upon as a defence it must be pleaded. It is a question of fact if prescription has run against the claim.

The averments of the declaration are for the most part stated upon belief and information. The statements of a pleading should be definite and precise. If within the party's knowledge they
16 should be stated in absolute form. If presumptively from the facts set out they are within the defendant's knowledge and not within the plaintiff's, or mainly within the defendant's knowledge, as much precision is not necessary as would otherwise be required. It may be said that the plaintiff, being a special master, should be presumed to have no personal knowledge of the facts of the case, but in my opinion he should either so aver, or state them as of his own knowledge and in absolute form; and the declaration appearing otherwise sufficient and in proper form the general demurrer to it is sustained only upon the ground indicated.

Thereupon came the plaintiff by his attorney and filed in the clerk's office of said court an amendment to declaration in this cause, which said amendment is as follows, to wit:

Amendment to Declaration.

U. S. District Court for Porto Rico.

ROBERT A. MILLER, as Special Master,
vs.
THE ROYAL INSURANCE COMPANY OF LIVERPOOL.

Amendment to Declaration by Leave of Court.

First. Amend by adding in the body of the declaration (and not in the policy conditions incorporated therein) after the words: "or expontaneous heat" the following words: "or rebellion or foreign enemy, or martial law, nor while undergoing process, by which the application of fire heat is necessary."

Second. Amend by adding at the end of the declaration the following lines and words: "And the plaintiff upon information and belief avers that demand- have repeatedly been made on the defendant as late as in the year 1897, but that the defendant has not paid. And the plaintiff further avers that as to all the matters and things hereinbefore alleged upon information and belief he has no own personal knowledge and therefore avers them on information and belief.

C. M. BOERMAN,
Plaintiff's Att'y.

17 U. S. OF AMERICA,
District of Porto Rico.

Robert A. Miller on oath says that the foregoing amendment to the declaration is true in his own knowledge except as to those matters alleged herein on information and belief and as to those he believes it to be true.

ROBERT A. MILLER.

Sworn to before me this 16th day of May 1902.

A. AGUAYO,
D. C. U. S. District Court.

And afterwards, to wit: on the 17th day of May in the year last aforesaid came the defendant by its attorney and filed in the clerk's office of the court aforesaid a plea in this cause, which said plea is as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT A. MILLER, Special Master,
vs.
THE ROYAL INSURANCE Co.

Plea.

Now comes the defendant, Royal Insurance Company, and for a defence to said action files the following pleas:

1st. Because this defendant never promised in manner and form as alleged in plaintiff's declaration.

2nd. That the cause of action upon which the plaintiff seeks to recover did not accrue within six years before the said suit was filed and this plea the defendant makes in barr to the plaintiff's cause.

3rd. That the cause of action upon which the plaintiff seeks to recover did not accrue within fifteen years before the said suit was filed, and this plea the defendant makes in barr to the plaintiff's cause.

J. M. KEEDY,
Att'y — Def't.
FELICI & CO.,
By Order Otto. Wantzelius.

UNITED STATES OF AMERICA,
District of Porto Rico, } *ss:*

Otto. Wantzelius being duly sworn upon his oath says that the matters and things stated in the foregoing pleas are true in substance and in fact.

This affidavit is made by Otto. Wantzelius representing Felici & Co. as sub-agents of the defendant company.

— —.

18 Sworn to and subscribed before me this 17th day of May, 1902.

A. AGUAYO,
D. C. U. S. D. C.

And afterwards, to wit: on the 20th day of May in the year last aforesaid came the plaintiff by his attorney and filed in the clerk's office of the court aforesaid a plea and demurrer in this cause, which said plea and demurrer is as follows, to wit:

Plea and Demurrer.

In the United States District Court for Porto Rico.

ROBERT A. MILLER, Special Master,
against
ROYAL INSURANCE CO. OF LIVERPOOL.

And the plaintiff as to the plea of the defendant first by him pleaded whereof he has put himself upon the country does the like. And as to the second and third pleas of the defendant, plaintiff says that the said pleas and the matters therein contained in manner and form as the same are above set forth and stated are not sufficient in law and that the plaintiff is not bound by law to answer the same and this he is ready to verify.

Wherefore for want of sufficient pleas in this behalf the plaintiff prays judgement.

C. M. BOERMAN,
Plaintiff's Attorney.

U. S. OF AMERICA,
District of Porto Rico, } *ss:*

Robert A. Miller on oath says that the foregoing plea is true and that the demurrer therein to attached is not interposed for delay.

ROBERT A. MILLER.

Sworn to before me this 20th day of May 1902.

H. H. SCOUVILLE,
Deputy Clerk.

Thereupon an entry was made upon the journal of said court in said cause, which said entry is as follows to wit:

MILLER
vs.
ROYAL INSURANCE CO.

Now comes the plaintiff herein, by his attorney C. M. Boerman Esq.; and files plea and demurrer to plea and after hearing counsel of defendant in opposition thereto the demurrer is submitted.

19 And afterwards, to wit: on the same day in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

MILLER
vs.
ROYAL INSURANCE CO.

The demurrer herein is sustained as to the second paragraph of plea, leave is given the plaintiff to file reply to plea, affidavit is filed by defendant and upon its motion the cause is continued at its costs.

And afterwards, to wit: on the 22nd. day of May in the year last aforesaid came the plaintiff by its attorney and filed in the clerk's office of said court a replication in this cause, which said replication is as follows, to wit:

Replication.

In the United States District Court for Porto Rico.

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE CO. OF LIVERPOOL.

And the plaintiff as to the plea of the defendant by him first pleaded and whereof he has put himself upon the country does the like.

And the plaintiff as to the plea of the defendant by him above pleaded says that the plaintiff by reason of anything in that plea alleged ought not to be barred from having his aforesaid action because he says that the defendant during many years upon information and belief of plaintiff was absent beyond the seas and in a foreign country and did not have a residence in the island of Porto Rico and also that extrajudicial claims *has* been made on the defendant in the year 1897 and this the plaintiff is ready to verify. That the plaintiff avers this upon information and belief because he has no personal knowledge of it. Wherefore he prays judgement.

C. M. BOERMAN,
Plaintiff's Attorney.

Robert A. Miller on oath says that the foregoing replication is true to his knowledge and as to matters alleged on information and belief he believes it to be true.

ROBERT A. MILLER.

Sworn to before me this 22nd May 1902.

A. AGUAYO, *D. C.*

And afterwards, to wit: on the 26th day of November in the year last aforesaid came the defendant by its attorneys and filed in the clerk's office of said court an application for a commission, which said application is as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

Application for Commission to Take Testimony.

Now comes The Royal Insurance Company, defendant herein, by its attorneys, Dexter and Hord and J. M. Keedy, and prays the court to grant a commission for the taking of testimony of certain material and necessary witnesses who live in the city of Liverpool, England. Petitioners state that the witnesses to be examined are the officers of defendant company only who are cognizant of the affairs of the company in Porto Rico during all of the times mentioned in the declaration filed herein, and who are familiar with the facts and circumstances attending and connected with the loss under the insurancy policy sued on, and the failure of the holder and owner thereof to comply with the conditions of said policy after said loss.

Interrogatories are submitted herewith and petitioners pray that this court will order that upon the service of a copy thereof upon plaintiff or his attorney, that plaintiff will submit in the office of the clerk of this court within three days thereafter his cross interrogatories, and within four days after the filing of such cross interrogatories defendant shall file its redirect interrogatories; and thereupon said interrogatories shall be forwarded with a commission
21 from this court to William Thomas Rogers, No. 13 Castle street Liverpool, England, that he may take the testimony — such witnesses as may be produced by defendant before him at the earliest practicable date and shall then return such testimony to this court duly verified and certified, with all convenient speed and diligence.

J. M. KEEDY,
DEXTER AND HORD,
Attorneys for Def't.

UNITED STATES OF AMERICA,
Island of Porto Rico.

I, Henrry F. Hord and of counsel for defendants herein, being duly sworn on my oath do say: That I verily believe that the taking of the depositions to the accompanying interrogatories is necessary to the justice of this case; that the said testimony is material and that the names of the said witnesses are unknown to counsel.

HENRRY F. HORD.

Subscribed and sworn to before me this 25th day of November 1902.

RICARDO NADAL, *Clerk*,
By H. H. SCOUVILLE,
Deputy Clerk.

Thereupon the court made an order, which was entered in the book of said court, in said cause, which said order is as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at San Juan, November 26th, 1902.

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

Order.

Now comes the defendant, The Royal Insurance Company, by its attorneys, Dexter and Hord, and files its motion for a commission to take the testimony of certain witnesses in London, England. It also filed the affidavit of Henry F. Hord, one of its attorneys, in support thereof; also interrogatories were submitted therewith and in consideration thereof it is now ordered in open court; that upon the service of the copy of said interrogatories upon the plaintiff, or his attorney, the plaintiff will file in the office of the clerk of this court within five days thereafter his cross-interrogatories, if any he
22 have, and within three days thereafter the defendant shall file its re-direct interrogatories if any and thereupon all of said interrogatories shall be forwarded with a commission from this court to Charles J. Watts and Henry G. Bishop, number 5 Nicolas lane, London England, that they, or either of them after being sworn as provided by the oath annexed to the commission may take the testimony of such witnesses as may be produced by the defendant before them at the earliest practicable date and shal- return such testimony to this court duly verified and certified with all convenient speed and diligence.

And afterwards, to wit: on the 9th day of December in the year last aforesaid there was issued out of the clerk's office of said court a commission to take testimony in this case, which said commission is as follows, to wit:

THE UNITED STATES OF AMERICA,
District of Porto Rico.

The President of the United States of America to Charles J. Watts and Henry G. Bishop, number five Nicolas lane, London, England, Greeting:

Know ye, that we, in confidence of your prudence and fidelity have appointed you commissioners and by these presents do give you and each, or either one of you, full power and authority, diligently to examine upon his or their respective corporal oaths or affirmations before you to be taken, such witnesses as shall be brought before you by the Royal Insurance Company to give testimony in a certain cause now pending undetermined in the district court of the United States of America for Porto Rico, wherein Robert A. Miller as special master is plaintiff and the said Royal Insurance Company defendant, touching the premises on the interrogatories hereunto annexed.

And we do further empower you, or each or either of you, to examine in the same behalf, and in like manner any other person or persons who may be produced as witnesses before you.

23 And before beginning the said examination of witnesses you will take and subscribe to an oath before a notary public that you will faithfully comply with this commission, which oath shall be in the following form, to wit:

"I hereby make oath that I shall faithfully comply with the commission issued to me by the district court of the United States for Porto Rico for the taking of testimony of witnesses in behalf of the defendant in the case of Robert A. Miller special master *versus* Royal Insurance Company, and shall return the same, together with the testimony of such witnesses to the said court fully and faithfully as given by them."

And you shall also administer to each witness who may testify the following oath: "Do you solemnly swear that you will make true answers to the interrogatories now about to be propounded to you as a witness in the case Robert Miller, special master *versus* Royal Insurance Company, so help you God."

And we do hereby require you, or either of you, before whom such testimony may be taken, to reduce the same to writing, with a certificate signed by you or either of you who may take such testimony showing compliance with this commission, and after closing up the same, under your hand, and seal if you have one, directed to Ricardo Nadal, Esq., clerk of the district court of the United States for Porto Rico, at San Juan, Porto Rico, and that you return the same when executed as above directed, annexed to this writ, with the title of the cause endorsed on the envelope of the commission into the said district court before the judge thereof with all convenient speed.

Witness the Honorable Wm. H. Holt, jud-e of the district court

of the United States for Porto Rico in the city of San Juan, this ninth day of December, 1902.

Attest:

RICARDO NADAL,
Clerk U. S. District Court of Porto Rico,
By H. H. SCOUVILLE,
Deputy Clerk.

24 And afterwards, to wit: on the 12th day of January A. D. 1903, came the defendant by its attorneys and tendered in the clerk's office in said court an amended plea, which said amended plea is as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT A. MILLER, Special Master,
vs.
THE ROYAL INSURANCE COMPANY.
} Common Law. No. —. Amended Plea.

Now comes the defendant, The Royal Insurance Company, by Dexter & Hord and J. M. Keedy, its attorneys, and by leave of court, files this its amended plea to the declaration of plaintiff heretofore filed, and says:

1. It never promised as in manner and form as in said declaration alleged and this it prays may be inquired of by the country.

2. For second and further plea defendant says that plaintiff ought not to have and maintain his aforesaid action for the reason that the alleged cause of action sued upon did not occur within three years before this suit, and of this defendant puts itself upon the country.

3. For a third and further plea defendant says that said plaintiff ought not to have and maintain his aforesaid action for the reason that the alleged cause of action sued upon herein did not occur within fifteen years before this suit and of this defendant puts itself upon the country.

4. For a fourth and further plea defendant says that neither plaintiff nor the Caja de Ahorros in whose behalf he sues as special master ought to recover herein because neither the said plaintiff nor the said Caja de Ahorros has or ever has had any interest in the said alleged loss of the said policy sued on, and never has had nor now has any interest in the said alleged loss, and has not nor ever has had any insurable interest in the property insured under said policy and which was alleged to have been destroyed by fire as in
25 said declaration alleged, and neither plaintiff nor the said Caja de Ahorros is entitled to the proceeds of said policy, and no contract has ever been made between the said Caja de Ahorros and the said Antonio J. Amadeo, the original owner and holder of the said policy, by which the same or the loss thereunder was agreed to be paid to said Caja de Ahorro or to the plaintiff, and

no assignment has ever been made to the said Caja de Ahorro or to plaintiff by the said Antonio J. Amadeo or by any other person entitled to the said policy of insurance and the loss thereunder, and no transfer of the said policy of insurance or the loss thereunder has ever been made to the said Caja de Ahorro with the consent and knowledge of the defendant or in accordance with the requirements of the conditions of the said policy of insurance, and of this defendant puts itself upon the country.

5. For a fifth and further plea defendant says that the plaintiff ought not to recover herein for the reason that the party to whom the said policy was originally issued materially misdescribed the property insured and the building and place in which it was situated, and omitted to state the facts material to be known for estimating the risk both at the time of affecting the said insurance and afterwards, all of which said misdescriptions and omissions were materially and greatly to the prejudice of the defendant, and this defendant is ready to verify.

6. Defendant says that plaintiff ought not to recover herein for the reason that no transfer of the policy sued on herein was made to plaintiff or to the said Caja de Ahorro, or to any other person, with the consent of the defendant, and no notice of any such transfer has been given to the defendant, and the subsistence of the insurance was not requested in favor of plaintiff or the said Caja de Ahorro or any other person by a memorandum endorsed upon the said policy by or in behalf of defendant, and no request was made therefor by any person as required by the conditions of the
26 said policy; and defendant says that the said policy or the loss thereunder was not transferred nor did it pass or accrue to the said Caja de Aborros or to the plaintiff from the said Antonio J. Amadeo to whom the said policy was originally issued either by will or by operation of law, and of this defendant puts itself upon the country.

7. For a seventh and further plea defendant says that plaintiff ought not to maintain his aforesaid action because after contracting the insurance by the party to whom the policy was originally issued the risk was materially increased by him to the great prejudice of defendant and without its knowledge or consent by the introduction of operations, business and goods which were hazardous, and because a hazardous trade was established near the said property insured, and this defendant is ready to verify.

8. For an eight- and further plea to the declaration of plaintiff defendant says that plaintiff should not have or maintain his said cause of action because there was no such loss or damage to the amount and in the manner as alleged in said declaration, and of this defendant puts itself upon the country.

9. For a ninth and further plea to the declaration herein defendant says that the plaintiff ought not to have and recover herein because neither the said Antonio J. Amadeo nor any one else, after the happening of the alleged loss or damage by fire to any of the property so insured, did, within fifteen days thereafter, deliver to

defendant as particular an account as was reasonably practical of the several articles or matters damaged or destroyed by fire, and also all other articles and matters insured by the said policy, with the estimated value of each of them respectively, having regard to their several values at the time of the fire and also of the nature and amount of the loss or damage occasioned to each or any such article or matter and of the interest of the insured therein; and in support thereof such vouchers, proofs and explanations and
27 other evidence which was required by or on behalf of defendant, together with a statutory declaration which was required by defendant of the truth of the account, and of this defendant puts itself upon the country.

10. For a tenth and further plea defendant says that plaintiff ought not to have and recover in this action for the reason that the alleged damage or loss occurred in the building insured in which petroleum oil or coal oil, canfina, benzine, nap-tha and liquids of the same kind were stored at the time of the said fire without the special permission of defendant endorsed upon the policy or given in any other manner, by reason of which the risk was materially increased and greatly to the prejudice of defendant and by reason of which said fire occurred, all of which defendant is ready to verify.

11. For the eleventh and further plea defendant says that plaintiff ought not to have and recover herein for the reason that the claim made by the insured was false and fraudulent in many material respects, and that the fire occurred by incendiarism resulting from the negligence and conduct of the insured, and this defendant is ready to verify.

12. For a twelfth and further plea to the declaration defendant says that the plaintiff ought not to have and recover herein for the reason that after the claim for loss and damage under the said policy of insurance had been refused by defendant by reason of the failure to present proper statements and proofs of loss as herein and in other pleas set forth, and as by the conditions of the said policy were required, and because of the false, fraudulent and insufficient character of the said claims, no judicial action was brought to enforce such claim within the term of three months after such refusal, all of which defendant is ready to verify.

13. For a further plea to the declaration of plaintiff defendant says that plaintiff ought not to recover herein for the reason that
28 at the time of the execution of the said mortgage by the said Antonio J. Amadeo to the said Caja de Ahorro the said policy of insurance had been prior to that date and on the third day of September, eighteen hundred and eighty-four, assigned, transferred, pledged and hypothecated to the Credito Mercantil, a bank at San Juan, Porto Rico, by the said Antonio J. Amadeo, who was at that time the owner and holder of the said policy, from claim of the said Caja de Ahorro or any other person, and that at the date of the execution of the said mortgage inscribed in the mortgage, the said Credito Mercantil were the owners and holders of the said policy, subject to the payment of an indebtedness of a large amount to it

by the said Antonio J. Amadeo, and thereafter defendant avers that the said policy of insurance was duly attached while in the possession and subject to the claims and interest of the said Credito Mercantil, in a suit instituted by it against the said Antonio J. Amadeo and others in the court of the first instance, in the city of San Juan, in the Cathedral district of said city, and later continued before the successor of said court in the said city, as a result of which a judgement was entered by the said court against the said Antonio J. Amadeo and others ordering the sale of the said policy of insurance to satisfy the debt of the said Credito Mercantil, and thereupon and in pursuance of the said judgement and by the writ thereof of May twenty second, eighteen hundred and ninety, the said policy was *had* at public au-tion, and thereafter was adjudicated and awarded to the said Credito Mercantil as aforesaid, which said adjudication was made in the said court aforesaid on the six day of August, eighteen hundred and ninety one, and thereafter in accordance with the law and practice then existing, the judge of the said court, to wit: Don Eugenio Luzarreti y Conget, executed, on the seventeenth day of September, eighteen hundred and ninety-one, before the notary public Don Mauricio Guerra, San Juan, a conveyance of the said policy and all rights thereunder, free and clear of the
29 rights of all other parties whatsoever, and defendant says that no transfer or assignment of the rights or interest in the said Credito Mercantil in and to such policy of insurance or the loss thereunder has ever been had or made to plaintiff herein or to the said Caja de Ahorro, all of which defendant is ready to verify.

DEXTER AND HORD,
J. M. KEEDY,
Attorneys for the Defendant, The Royal Insurance Company.

UNITED STATES OF AMERICA,
District of Porto Rico, } ss:

Otto Wantzelius attorney of Felici and Co. being duly sworn upon his oath says that he is a subagents of The Royal Insurance Company defendant in the above entitled cause, and that the facts set forth in the above plea are true.

P. P. FELICI AND CO.
OTTO WANTZELIUS.

Sworn to before me this 12th day of January 1903.

A. AGUAYO, *D. C.*

Thereupon an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

Additional plea tendered, argued and submitted and case is set for January 20th 1903.

And afterwards, to wit: on the 24th day of January A. D. 1903, an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

The deposition on the commission heretofore issued herein is received opened and filed.

And afterwards, to wit: on the 4th day of February in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

The motion to file the amended or additional pleas tendered herein on January 12th 1903, owing to their present form is refused.

And afterwards, to wit: on the 6th day of February in the year last aforesaid came the defendant by its attorneys and tendered an amended plea in this cause, which said amended plea is as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

Amended Plea.

Now comes the defendant Royal Insurance Company, by its attorneys J. M. Keedy, and by leave of the court first had and obtained, files this its amended plea to the declaration of plaintiff herein filed and says:

For a further and fourth plea to the declaration of plaintiff, defendant says that plaintiff ought not to recover herein for the reason that at the time of the execution of said mortgage by said Antonio J. Amadeo to said Caja de Ahorros, the said policy of insurance had been prior to that date and on the third day of September, 1884, assigned, transferred, pledged and hypothecated to the Credito Mercantil, a bank at San Juan, Porto Rico, by the said Antonio J. Amadeo who was at that time the owner and holder of the said policy free from claim of the said Caja de Ahorros or any other person and that at the date of the execution of the

said mortgage described in the declaration the said Credito Mercantil were the owners and holders of said policy subject to the payment of an indebtedness of a large amount to it by the said Antonio J. Amadeo, and thereafter defendant avers that
31 said policy of insurance was duly attached while in the possession and subject to the claims and interest of the said Credito Mercantil, in a suit instituted by it against the said Antonio J. Amadeo and others in the court of first instance in the city of San Juan in the Cathedral district of said city, and later continued before the successor of said court in the said city, as a result of which a judgement was entered by said court against the said Antonio J. Amadeo and others ordering the sale of the said policy of insurance to satisfy the debt of the said Credito Mercantil and thereupon and in pursuance of the said judgement and by the writ thereof of May 22nd. 1890, the said policy was sold at public auction, and thereafter was adjudicated and awarded to the said Credito Mercantil, as aforesaid, which said adjudication was made in the said court aforesaid on the 6th day of August, 1891, and thereafter in accordance with the law and practice then existing the judge of said court, to wit, Don Eugenio Luzareti y Conget, executed on the 17th day of September, 1891, before the notary public, Don Maurico Guerra San Juan, a conveyance of the said policy and all rights thereunder, free and clear of the rights of all other parties whatsoever, and defendant says that no transfer or assignement of the rights or interest in the said Credito Mercantil in and to such policy of insurance or the loss thereunder has ever been had or made to plaintiff herein or to the said Caja de Ahorros, all of which defendant is ready to verify.

J. M. KEEDY,
DEXTER & HORD,
Attorneys for Defendant, Royal Ins. Co.

UNITED STATES OF AMERICA, }
District of Porto Rico, } ss:

Felici and Co. by Otto Wantzelius being duly sworn says that he is a sub-agent of The Royal Insurance Company, defendant in the above entitled cause, and that the facts set forth in the above entitled *cause, and that the facts set forth in the above* plea are true.

OTTO WANTZELIUS.

Sworns to and subscribed before me this 5th day of February 1903.

RICARDO NADAL, *Clerk*,
By A. AGUAYO, *D. C.*

32 And afterwards, to wit: on the 6th day of February in the year last aforesaid an entry was made upon the journal of said court in said cause which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

Now comes the defendant by its attorneys Dexter and Hord, and tenders an amended plea herein, and moves that it be filed to which plaintiff objects.

The plaintiff withdraws his replication to the third plea and files a demurrer thereto.

Thereupon F. H. Dexter Esq.; one of the attorneys for the defendant filed his affidavit in support of motion to file amended plea and two weeks is given to each side to file briefs.

And afterwards, to wit: on the 13th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.
No. 113.

The amended plea tendered herein on February 6th 1903, is allowed to be filed, thereupon the plaintiff filed a replication.

Thereupon came the plaintiff and filed in the clerk's office of said court a replication in this cause, which said replication is as follows, to wit:

United States District Court for Porto Rico.

ROBERT A. MILLER, Special Master,
against
THE ROYAL INSURANCE COMPANY.

And the plaintiff says that as to the additional amended plea of the defendant he admits all that part of it which commences with the words: "And all other parties whatsoever" but denies all the rest of said plea and avers upon information and belief that
33 the insured never assigned said policy but has given it as collateral security on a loan made by him from the Credito Mercantil, a banking institution on behalf of which an order of attachment has been issued by the court of first instance of San Juan, and the policy was then after the loss by fire sold at public auction by said court and bought in by said Credito Mercantil and thereafter said policy was purchased from said Credito Mercantil by Lucas Amadeo and the plaintiff prays that this may be inquired of the country etc.

C. M. BOERMAN,
Plaintiff's Att'y.

Robert A. Miller on oath says that the foregoing replication is true in substance and fact.

ROBERT A. MILLER.

Sworn to before me this 13th day of May 1903.

A. AGUAYO,
Deputy Clerk.

And afterwards, to wit: on the 13th day of May in the year last aforesaid, came the plaintiff by his attorney and filed in the clerk's office of the court aforesaid an amended complaint in this cause, which said amended complaint is as follows, to wit:

United States District Court for Porto Rico.

ROBERT A. MILLER, Special Master,
against
THE ROYAL INSURANCE COMPANY.

Amended Complaint.

And the plaintiff hereby and by leave of court amends his complaint as follows:

In the title of the case after the name of the plaintiff add: "And Lucas Amadeo."

In the body of the complaint add at the end the following paragrap-:

"And the plaintiff aver- that the said policy of insurance has been given as collateral security on a loan to the Credito Mercantil, a banking institution by the insured J. A. Amadeo and that afterwards, to wit: after the fire in the year 1890 it was sold by an order of court on an attachment writ of the court of the first instance of San Juan Cathedral district in a public auction to said
34 Credito Mercantil, and that afterwards in the year 1896 said policy was acquired by purchase by Lucas Amadeo one of the plaintiffs herein of which he is now a part owner subject to the mortgage of the insured to the Caja de Ahorros.

C. M. BOERMAN,
Plaintiff's Att'y.

U. S. OF AMERICA,
District of P. R., } ss:

Robert A. Miller on oath says, that the foregoing complaint is true.

ROBERT A. MILLER.

Sworn to before me this 13th day of May 1903.

A. AGUAYO, *D. C.*

And afterwards, to wit: on the 18th day of May in the year last aforesaid came the plaintiff by his attorney and filed in the clerk's office of said court an amendment of complaint, which said amendment is as follows, to wit:

ROBERT A. MILLER ET AL.
vs.
ROYAL INSURANCE CO.

The plaintiff with leave of court amends the complaint as follows: After the words its policy of insurance" on the 12th line of first page of declaration add the words "on a stock of sugar and molasses deposited in the sugar factory on the estate of one Quebrada Arenas jurisdiction of Maunabo, Porto Rico, this judicial district.

C. M. BOERMAN,
Plaintiff's Att'y.

Robert A. Miller on oath says that the foregoing amendment is true.

ROBERT A. MILLER.

Sworn to before me this 18th day of May 1903.

A. AGUAYO, *D. C.*

And on the same day and year last aforesaid came the defendant by its attorneys and filed in the clerk's office of the court aforesaid a joinder in issue in replication, which said joinder in issue is as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

Joinder in Issue on Replication.

35 Now comes the defendant and as to that part of the replication herein filed May 13th 1903 as to which plaintiff puts himself upon the country does the like.

DEXTER & HORD,
J. M. KEEDY,
Att'y- for Def't.

And afterwards, to wit: on the 18th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
THE ROYAL INSURANCE COMPANY. } No. 113.

This case having come on regularly for trial the parties announced ready.

Whereupon the marshal directed to summon eighteen good upright sober men to serve on the panel in the case.

Thereupon by leave of court the defendant is allowed an exception to the ruling of the court in allowing Lucas Amadeo to be made a party plaintiff herein.

Thereupon the defendant files a joinder on plaintiff's replication.

Thereupon the marshal summoned the following named persons to serve on the panel of the case: P. F. Morgan, C. A. Teller, George Armstrong, M. R. Morales, Miguel Hernandez, Jacinto Torruella, L. A. Proctor, E. Munster, E. L. Zowe, G. Shuck, Mariano Vidal, L. A. Groves, H. B. Thomas, D. A. Palmer, George C. Towle, Desiderio Canals, C. K. Joiner, F. H. Lutens.

The jury as impaneled and sworn to try the case is composed of the following named persons to wit: C. A. Teller, P. F. Morgan, Mariano Vidal, George C. Towle, M. R. Morales, L. Groves, Jacinto Torruella, L. A. Proctor, E. Munster, G. Schuck, D. A. Palmer, and Desiderio Canals.

Thereupon the court allows the defendant, to file and rely upon the defences set up in the 5th, 6th, 7th, 9th, 10th, and 11th paragraphs of the amended plea tendered January 12th 1903, and which plea to that extent is now marked filed to which ruling the plaintiff except- and said paragraphs of said plea are now traversed upon the record.

36 Thereupon the jury hears all the evidence for the plaintiff and part of the evidence for the defendant.

And afterwards, to wit: on the 19th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY. } No. 113.

Resumed. The jury hears the conclusion of the testimony in the case.

And afterwards, to wit: on the 20th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY. } No. 113.

Resumed. The jury hears the argument of counsel and charge of the court retires and thereafter returns into court the following verdict, viz: "In the case of the plaintiff against the Royal Insurance Company of London, England, before the United States Federal court, we, the jury find for the plaintiff in the total amount of twelve thousand dollars $12,000.00.

D. DE ALONSO PALMER, *Foreman.*"

And afterwards, to wit: on the 22nd day of May in the year last *afa*foresaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master, ET AL.
vs.
THE ROYAL INSURANCE COMPANY. } No. 113.

Judgement.

This cause having come on for trial at this term of court and the jury having been impaneled and sworn and after hearing all the testimony in the case, having rendered a verdict in favor of the plaintiffs for the sum of twelve thousand dollars it is hereby:
37 Adjudged that the defendant The Royal Insurance Company of Liverpool pay to the plaintiff's Robert Miller, special master and Lucas Amadeo the sum of twelve thousand dollars and interest thereon at six per cent. per annum from this date until paid together with the costs of this action to be taxed by the clerk of this court and that execution may issue thereon.

Thereupon comes the defendant in the above entitled cause by its attorneys Dexter & Hord and files a motion for a new trial and motion in arrest of judgement which said motions are as follows, to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT A. MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY. } Common Law. 113.

Motion for a New Trial.

Now comes the defendant, Royal Insurance Company, by its attorneys Dexter & Hord and J. M. Keedy, and moves for a new trial herein for the reasons following:

1st. Because the court erred in overruling the motion filed by defendant at the conclusion of the testimony in this case, requesting the court to direct a verdict in favor of the defenda-t, which said motion was based upon the following grounds, to wit:

1. Because the alleged cause of action is under the pleadings and proofs prescribed by limitation.

2. Because plaintiff Miller has no right to recover herein.

3. Because plaintiff Lucas Amadeo has no right to recover herein and he has been improperly joined as a party plaintiff.

2nd. Because the court erred in refusing to give instructions numbers one, two, three and five, as asked by the defendant, and which are as follows, to wit:

The court instructs the jury that if they believe from the evivence that at the time that Antonio J. Amadeo had the conversa-
38 tion with the witness, Watlington, in the office of Henry Beste New York said Watlington was not an agent of or employed by the defendant company, then nothing that he may have said or done at that time could bind the defendant company.

(2.) The court instructs the jury that unless you believe from the evidence, that a suit has been brought against the defendant company to recover on the policy herein within fifteen years after the fire occur-ed, or unless defendant company by an agent duly authorized acknowledged the claim in writing within such period of fifteen years, plaintiff cannot recover herein.

(3.) The court instructs the jury that unless a demand was made by Antonio J. Amadeo or some one for him upon the defendant company or upon some agent having authority to represent them in the presence of witness called for that purpose within fifteen years prior to the bringing of this suit in April 23rd 1902 plaintiff cannot recover.

(5.) The court instructs the jury that neither the Caja de Ahorros nor Robert A. Miller, special master, has any right to recover against defendant on account of any policy of insurance upon personal property and if you believe that the property insured under the policy sued on was sugar and molasses you must find for the defendant.

3rd. Because the court erred in such parts of its charge to the jury to which exceptions were taken, as follows, to wit:

ATTORNEY FOR DEFENDANT: The defendant excepts to that part of your honor's charge which is, substantially, as follows:

"If any person is sent by the company in connection with the insured and they make a statement of the loss, that was all the insured — required to do."

Because this eliminates the question of the special adjustor having the right to make or exact requirements from the insured.

The COURT: Save the question.

ATTORNEY FOR DEFENDANT: The defendant excepts to that part of your honor's charge to the jury, as follows:

"That there is testimony tending to show that objections were

made three months or more after the proofs were presented, which would not be made in time."

Because the testimony in this case tended to show that proofs were presented in March and were objected to in April.

The COURT: The testimony tended to show that the proofs were presented in February.

ATTORNEY FOR DEFENDANT: I think Amadeo himself testified that it was within a period of two weeks.

The defendant also excepts to that part of your honor's charge as follows:

39 "There is testimony tending to show that in May, 1887, the insured, Antonio Amadeo, went to New York and found the agent who had been sent to Porto Rico to adjust the loss, and there is testimony tending to show that he then demanded settlement and that such agent or adjustor offered him in settlement twenty five thousand dollars."

In that said part of said charge is not qualified by the further statements that said adjustor at that time must have had authority to act for the company.

The COURT: That I overrule. This company was a foreign insurance company and the party did not know to whom to go.

ATTORNEY FOR THE DEFENDANT: We base that exception on the ground that after the loss the insured was bound to take notice with whom he was dealing.

The COURT: That is overruled. Save the exception.

ATTORNEY FOR DEFENDANT: Defendant also excepts to that part of the court's charge as follows:

"If the company sent a man to Porto Rico in 1885 with general power to settle a loss then if that power applied to this loss only, then if the insured had no notice that such power had ceased, he had the right to apply to him for a settlement of the loss, and if the party made an offer, then that cut off the operation of the statute of limitations.

The COURT: Save the exception.

ATTORNEY FOR DEFENDANT: Defendant excepts to that part of the court charge which states:

"There is testimony tending to show that in 1898 Battistini went to Liverpool and demanded the payment; he had the policy and was acting for Lucas Amadeo, and if you believe this party acting for Amadeo demanded payment, and there was an agreement to pay a certain sum then that would cut off the running of the statute."

We except to that part as it refers to a simple demand as being sufficient.

The COURT: You think the demand has to be in writing?

ATTORNEY FOR DEFENDANT: Yes.

The COURT: I overrule it. Save the exception. * * *

4th. Because the court erred in admitting testimony over the objection of the defendant and under the pleadings herein as to the interests of both plaintiffs, Robert Miller, special master, and Lucas

Amadeo, in the policy sued on, for the reason that neither of said plaintiffs have the right to recover in this action.

5th. Because the court erred in admitting over the objection of the defendant testimony as to an alleged offer of the witness
40 Wa-lington in New York in 1887 unless it should be proved by said plaintiff that said Watlington was at that time the agent of the defendant company and authorized to bind it by any admission of indebtedness or promise to pay.

6th. Because the court erred in admitting over the objections of defendant testimony offered by plaintiff concerning the alleged demands made by Don Antonio Amadeo upon the defendant company in the year 1887 and 1888 and of the witness Pedro Battistini in the year 1898 for the reason that such demands were not sufficient to interrupt the prescription of the running of the statute of limitations.

8th. Because the court erred in admitting testimony in behalf of the plaintiffs as to their interest in the proceeds of this policy, for the reason that the policy of insurance sued on was issued upon a stock of sugar and molasses which, being personal property, was not included in or covered by the mortgage of Antonio Amadeo to the Caja de Ahorros, and therefore the policy of insurance sued on which was issued upon said property nor the proceeds thereof did not pass to either of the plaintiffs herein, and neither of said plaintiffs, has any right to sue for the recovery thereof.

9th. Because the verdict was contrary to the evidence in the case and not justified thereby.

10. Because the court erred over the objection of defendant in striking out those parts or portions of the depositions of Herbert Stanley Ardran taken in behalf of the defendant, as are marked in pencil and red ink in said depositions, said parts being as follows:

Portion of interrogatory No. 6.
All of interrogatory and answer No. 12;
All of interrogatory and answer No. 13;
All of interrogatory and answer No. 14;
All of interrogatory and answer No. 15;
All of interrogatory and answer No. 16;
All of interrogatory and answer No. 18;
All of interrogatory and answer No. 25;
That part of answer No. 25 that is marked out.

For the reason that said answers were material and compe-
41 tent and also for the reason that plaintiff did not file exceptions thereto in time required by the rules of this court.

DEXTER & HORD,
Attorneys for Defendant.

In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT A. MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.

Motion in Arrest of Judgement.

Now comes the defendant and moves for arrest of judgement for the following reasons:

First.

Because the court erred in overruling the demurrer filed to the declaration herein.

Second.

Because the court erred in overruling the demurrer to the amended declaration herein.

Third.

Because the court erred in permitting the amendments to the declaration herein.

Fourth.

Because the court erred in permitting Lucas Amadeo to become a party plaintiff and to sue herein upon a separate and distinct cause of action from that sued on by plaintiff Miller, special master.

Fifth.

Because of the misjoinder of causes of action and of parties plaintiff herein.

Sixth.

Because under the pleadings and proof neither plaintiff had the right to recover herein.

Seventh.

Because the verdict of the jury is irregular and void in that it is not sustained by the pleadings and proof.

DEXTER & HORD,
Attorneys for the Defendant.

42 And afterwards, to wit: on the 27th day of May in the year last aforesaid an entry was made upon the journal of said court in said cause which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master, ET AL.
vs.
THE ROYAL INSURANCE COMPANY.

The motion in arrest of judgement and for a new trial herein are heard and overruled, to which the defendant excepts.

And afterwards, to wit: on the 29th day of May in the year last aforesaid came the defendant by its attorneys and filed in the clerk's-office of said court a petition for writ of error and assignment of error-, which said petition and assignment of errors are as follows to wit:

In the District Court of the United States for Porto Rico, Sitting at Ponce, May Term, 1903.

ROBERT MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.
Common Law. No. 113.

The Royal Insurance Company, defendant, in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgement entered herein on the 22nd day of May, 1903, comes now by Dexter & Hord, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

May 29th 1903.

DEXTER & HORD,
Attorneys for Defendant.

In the District Court of the United States for Porto Rico, May Term, 1903.

43 ROBERT A. MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.
C. L. 113.

Assignment of Errors.

Comes now the defendant above named, Royal Insurance Company by its attorneys, Dexter & Hord, and files and presents the

following assignments of errors upon which it relies in the prosecution of the writ of error in the above entitled cause, to wit:

1st. Because the court erred in overruling the motion filed by defendant at the conclusion of the testimony in this case requesting the court to direct a verdict in favor of the defendant, which said motion was based upon the following grounds, to wit:

1. Because the alleged cause of action is under the pleadings and proofs prescribed by limitation.

2. Because plaintiff Miller has no right to recover herein.

3. Because plaintiff Lucas Amadeo has no right to recover herein and he has been improperly joined as a party plaintiff.

2nd. Because the court erred in refusing to give instructions numbers one, two, three and five, as asked by defendant, and which are as follows, to wit:

(1.) The court instructs the jury that if they believe from the evidence that at the time that Antonio J. Amadeo had the conversation with the witness Watlington, in the office of Henry Beste in New York, said Watlington was not an agent or *of* employed by the defendant company, then nothing that he may have said or done at that time could bind the defendant company.

(2.) The court instructs the jury that unless you believe from the evidence that a suit has been brought against the defendant company to recover on the policy herein within fifteen years after the fire occurred, or unless defendant company by an agent duly authorized acknowledged the claim in writing within such period of fifteen years, plaintiff cannot recover herein.

(3.) The court instructs the jury that unless a demand was made by Antonio J. Amadeo or some one for him upon the defendant company or upon some agent having authority to represent them in the presence of witnesses called for that purpose within fifteen years prior to the bringing of this suit on April 23rd, 1902, plaintiff can not recover.

(5.) The court instructs the jury that neither the Caja de Ahorros nor Robert Miller, special master, has any right to recover against defendant on account of any policy of insurance upon personal property, and if you believe that the property insured under the policy sued on was sugar and molasses you must find for the defendant

3rd. Because the court erred in such parts of its charge to
44 the jury to which exceptions were taken as follows, to wit:

ATTORNEY FOR DEFENDANT: The defendant excepts to that part of your honor's charge which is, substantially, as follows:

"If a person is sent by the company in connection with the insured and they make a statement of the loss, that was all the insured was required to do."

In that this eliminates the question of the special adjustor having the right to make or exact requirements from the insured.

The COURT: Save the question.

ATTORNEY FOR DEFENDANT: The defendant excepts to that part of your honor's charge to the jury as follows:

"That there is testimony tending to show that objections were

made three months or more after the proofs were presented, which would not be made in time."

In that the testimony in the case tended to show that proofs were presented in March and were objected to in April.

The COURT: The testimony tended to show that proofs were presented in February.

ATTORNEY FOR DEFENDANT: I think Amadeo himself testified it was within a period of two weeks.

ATTORNEY FOR DEFENDANT: Defendant also excepts to that part of your honor's charge as follows:

"There is testimony tending to show that in May, 1887, the insured, Antonio Amadeo, went to New York and found the agent who had been sent to Porto Rico to adjust the loss, and there is testimony tending to show that he then demanded settlement and that such agent or adjustor offered him in settlement twenty-five thousand dollars."

In that said part of said charge is not qualified by the further statement that said adjustor at that time must have had authority to act for the company.

The COURT: That I overrule. This company was a foreign insurance company and the party did not know to whom to go.

ATTORNEY FOR DEFENDANT: We base that exception on the ground that after the loss the insured was bound to take notice with whom he was dealing.

The COURT: That is overruled. Save the exception.

ATTORNEY FOR DEFENDANT: Defendant also excepts to that part of the court's charge, as follows:

"If the company sent a man to Porto Rico in 1885, with
45 general power to settle a loss then if that power applied to this loss only, then if the insured had no notice that such power had ceased, he had the right to apply to him for a settlement of the loss, and if the party made an offer, then that cut off the operation of the statute of limitations."

The COURT: Save the exception.

ATTORNEY FOR DEFENDANT: Defendant also excepts to that part of the court's charge as follows:

"There is testimony tending to show that in 1898 Battistini went to Liverpool and demanded the payment; he had the policy and was acting for Lucas Amadeo, and if you believe this party acting for Amadeo demanded payment, and there was an agreement to pay a certain sum, then that would cut off the running of the statute."

In that the charge refers to a simple demand being sufficient.

The COURT: You think the demand has to be in writing?

ATTORNEY FOR DEFENDANT: Yes.

The COURT: I overrule it. Save the exception. * * *

4th. Because the court erred in admitting testimony over the objection of the defendant and under the pleadings herein as to the interests of both plaintiffs, Robert Miller, as special master, and Lucas Amadeo, in the policy sued on, for the reason that neither of said plaintiff- has the right to recover in this action.

5th. Because the court erred in admitting over the objection of defendant testimony as to an alleged offer of witness Watlington in New York in 1887 unless it should be proved by said plaintiff that said Watlington was at that time the agent of the defendant company and authorized to bind it by any admission of indebtedness or promise to pay.

6th. Because the court erred in admitting over the objection of defendant testimony offered by plaintiff concerning the alleged demands made by Don Antonio Amadeo upon the defendant company in the year 1887 and 1888 and of the witness Pedro Battistini in the year 1898 for the reason that such demands were not sufficient to interrupt the prescription of the running of the statute of limitation.

7th. Because the court erred in admitting testimony in behalf of the plaintiffs as to their interest in the proceeds of this policy for the reason that the policy of insurance sued on was issued
46 upon a stock of sugar and molasses which, being personal property, was not included in or covered by the mortgage of Antonio Amadeo to the Caja de Ahorros, and therefore the policy of insurance sued on which was issued upon said property, nor the proceeds thereof did not pass to either of the plaintiffs, herein, and neither of said plaintiffs has any right to sue for the recovery thereof.

8th. Because the verdict was contrary to the evidence in the case and not justified thereby.

9th. Because the court erred, over the objection of defendant, in striking out those parts or portions of the depositions of Herbert Stanley Ardran taken in behalf of the defendant, as are marked in pencil and red ink in said deposition-, said parts being as follows:

Portion of interrogatory No. 6.
All of interrogatory and answer No. 12,
All of interrogatory and answer No. 13,
All of interrogatory and answer No. 14,
All of interrogatory and answer No. 15,
All of interrogatory and answer No. 16.
All of interrogatory and answer No. 18.
All of interrogatory and answer No. 25.
That part of answer No. 25 that is marked out.

For the reason that said answers were material and competent and also for the reason that plaintiff did not file exceptions thereto in time required by the rules of this court.

10th. Because the court erred in overruling the demurrer filed to the declaration therein.

11th. Because the court erred in overruling the demurrer to the amended declaration herein.

12th. Because the court erred in permitting the amendments to the declaration herein.

13th. Because the court erred in permitting Lucas Amadeo to become a party plaintiff and to sue herein upon a separate and dis-

tinct cause of action from that sued on by the plaintiff Miller., special master.

14th. Because of the misjoinder of causes of action and of parties plaintiff herein.

47 15th. Because under the pleadings and proof neither plaintiff had the right to recover herein.

16th. Because the verdict of the jury is irregular and void in that it is not sustained by the pleadings and proof.

In order that the foregoing assignments may be and appear of record the plaintiff in error, Royal Insurance Company presents the same to the court and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and plaintiff in error Royal Insurance Company, prays a reversal of the judgement entered in this cause as made and entered herein in the said district court of the United States for Porto Rico.

DEXTER & HORD,
Attorneys for Defendant, Royal Insurance Company.

May 29th 1903.

And thereupon an entry was made upon the journal of said court in said cause which said entry is as follows, to wit:

ROBERT A. MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.

Upon motion of the defendant herein by its attorneys Dexter & Hord time is given until Octobet 15th 1903, to file bill of exceptions.

The bond on appeal is fixed at twenty thousand dollars to be taken by the clerk of this court.

Thereupon said defendant files a petition for a writ of error and assignment of errors.

Whereupon the court makes the following order:

Order Allowing Writ of Error.

On this 29th day of May 1903, upon motion of Dexter & Hord attorneys for defendant above named and upon filing the petition for writ of error and assignment of errors it is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein and that the amount of bond on said writ of error and for the

48 purpose of supersedeas shall be and is hereby fixed at the sum of twenty thousand dollars.

And afterwards, to wit: on the same day in the year last aforesaid there was issued out of the clerk's office of the court aforesaid a writ of error in this cause which said writ of error is as follows, to wit:

UNITED STATES OF AMERICA:

ROBERT A. MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.

Writ of Error.

The President of the United States to Honorable William H. Holt, judge of the district court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of judgement of the plea which is in the said district court of the United States for Porto Rico before you between Robert Miller, special master and Lucas Amadeo, defendant- in error, and Royal Insurance Company, plaintiff in error, a manifest error happened to the great damage of The Royal Insurance Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any has been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgement be therein given, that under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Suprem- Court of the United States together with this writ, so that you have the same at the city of Washington, U. S. A., at the next term thereof to be then and there held that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

49 Witness: the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this twenty ninth day of May of the year of our Lord one thousand nine hundred and three.

Attest: RICARDO NADAL, *Clerk*,
By H. H. SCOWVILLE, *Deputy*.

Allowed by:
WM. H. HOLT,
Judge District Court of the
United States for Porto Rico.

And afterwards, to wit: on the 10th day of June in the year last aforesaid came the defendant and filed in the clerk's office of said court a supersedeas bond in this case, which said bond is as follows, to wit:

In the District Court of the United States for Porto Rico.

ROBERT MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.
} C. L. 113.

Supersedeas Bond.

Know all men by these presents that we, the Royal Insurance Company of Liverpool, as principal and the Fidelity Deposit Company of Maryland as surety, are held and firmly bound unto Robert Miller, special master of the Caja de Ahorros and Lucas Amadeo, plaintiffs in the above entitled action in the sum of twenty thousand dollars, to be paid to said Robert Miller, special master and Lucas Amadeo, their successors, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the tenth day of June, 1903, at the city of San Juan, Porto Rico.

Whereas, the above named defendant Royal Insurance Company of Liverpool has sued out a writ of error to the Supreme Court of the United States to reverse the judgement in the above entitled cause by the district court of the United States for Porto Rico, rendered at the May term, 1903, Ponce, now therefore, the condition of this obligation is such that if the above named Royal Insurance Company shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea then this obligation shall
50 be void, otherwise to remain in full force and effect.

ROYAL INSURANCE COMPANY, [SEAL.]
By SOBRINOS DE EZQUIAGA, *General Agents.*
FIDELITY AND DEPOSIT CO. OF MD.,
By E. L. ARNOLD, *Att'y-in-fact and Gen'l Agent.*

[Corporate Seal Fidelity & Deposit Co. of Md.]

Approved June 10th 1903.

RICARDO NADAL,
Clerk U. S. District Court of Porto Rico,
By FRANK ANTONSANTY,
Deputy Clerk.

And afterwards, to wit: on the same day and year last aforesaid the said court issued a writ of citation in this cause, which writ is as follows, to wit:

In the District Court of the United States for Porto Rico, May Term, 1903.

ROBERT A. MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.
} Common Law. 113.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert Miller, special master of the Caja de Ahorros, and Lucas Amadeo, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, D. C. U. S. A. within thirty days from this writ pursuant to a writ of error filed in the clerk's office of the district court of the United States for Porto Rico wherein The Royal Insurance Company is plaintiff in error and you are defendant- in error, to show cause, if any there be, why the judgement in the said writ of error me-tioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this tenth day of June A. D. 1903, and of the Independence of the United States the one hundred and twenty seventh.

[Seal United States District Court for the District of Porto Rico.]

WM. H. HOLT,
Judge of the District Court of the United States for Porto Rico.

Attest: RICARDO NADAL, *Clerk*,
By H. H. SCOWVILLE, *Deputy*.

51 And on the 11th, day of June in the year last aforesaid, came the marshal of said district to whom the said writ of citation was directed for service, and returned the same with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico,
} *ss:*

I hereby certify and return that I served the annexed citation on the therein named Robert A. Miller and Lucas Amadeo by handing to and leaving a true and correct copy thereof with Charles A.

Boerman attorney of record for plaintiff personally at Ponce in said district on the 11th, day of June A. D. 1903.—

E. S. WILSON,
U. S. Marshal,
By GEO. TRAUTMAN, *Deputy.*

52 In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT MILLER, Special Master, ET AL.
vs.
ROYAL INSURANCE COMPANY.
} C. L. 113.

Order Setting and Allowing Bill of Exceptions.

Now on this day, at chambers of this court, at San Juan, comes the Royal Insurance Company by its attorneys, Dexter and Hord, and submits to the judge its bill of exceptions herein; and the same having been submitted to and approved by C. M. Boerman Esq., attorney for plaintiffs who makes no objections to the same, the said bill of exceptions is by the judge aforesaid signed, approved and allowed this 14th, day of October 1903 as of the May term 1903 of this court at Ponce.

(Signed) WM. H. HOLT, *Judge.*

53 In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT MILLER and, by Amendment, Lucas Amadeo, Plaintiffs,
versus
THE ROYAL INSURANCE COMPANY OF Liverpool.
} Common Law. No. 113.

Bill of Exceptions.

Be it remembered that on the trial of this cause before the Honorable William H. Holt and a jury on the eighteen day of May, nineteen hundred and three, and continued thereafter on the nineteenth and twentieth of May, nineteen hundred and three, all at and during the regular May term of the said court begun and held in the said city of Ponce, Porto Rico aforesaid, the following proceedings were had.

54 The defendant, by its attorneys, Dexter & Hord, presented its motion to file the following amended plea:

"In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT A. MILLER, Special Master,
vs.
THE ROYAL INSURANCE COMPANY.
} Common Law. No. —. Amended Plea.

Now comes the defendant, The Royal Insurance Company, by Dexter & Hord and J. M. Keedy, its attorneys, and by leave of court files this its amended plea to the declaration of plaintiff heretofore filed, and says:

1. It never promised as in manner and form as in said declaration alleged and this it prays may be inquired of by the country.

2. For second and further plea defendant says that plaintiff ought not to have and maintain his aforesaid action for the reason that the alleged cause of action sued upon did not occur within three years before this suit, and of this defendant puts itself upon the country.

3. For a third and further plea defendant says that said plaintiff ought not to have and maintain his aforesaid action for the reason that the alleged cause of action sued upon herein did not occur within fifteen years before this suit and of this defendant puts itself upon the country.

4. For a fourth and further plea defendant says that neither plaintiff nor the Caja de Ahorros in whose behalf he sues as special master, ought to recover herein because neither the said plaintiff nor the said Caja de Ahorros has or ever has had any interest in the said alleged loss of the said policy sued on, and never has had nor now has any interest in the said alleged loss, and has not nor ever has had any insurable interest in the property insured under said policy, and which was alleged to have been destroyed by fire as in said declaration alleged, and neither plaintiff nor the
55 said Caja de Ahorros is entitled to the proceeds of said policy, and no contract has ever been made between the said Caja de Ahorros and the said Antonio J. Amadeo, the original owner and holder of the said policy, by which the same or the loss thereunder was agreed to be paid to said Caja de Ahorros or to the plaintiff, and no assignment has ever been made to the said Caja de Ahorros or to plaintiff by the said Antonio J. Amadeo or by any other person entitled to said policy of insurance and the loss thereunder, and no transfer of the said policy of insurance or the loss thereunder has ever been made to the said Caja de Ahorros with the consent and knowledge of the defendant or in accordance with the requirements of the conditions of the said policy of insurance, and of this defendant puts itself upon the country.

5. For a fifth and further plea defendant says that the plaintiff ought not to recover herein for the reason that the party to whom the said policy was originally issued materially misdescribed the property insured and the building and place in which it was situ-

ated, and omitted to state the facts material to be known for estimating the risk, both at the time of affecting the insurance and afterwards, all of which said misdescriptions and omissions were materially and greatly to the prejudice of the defendant, and this defendant is ready to verify.

6. Defendant says that plaintiff ought not to recover herein for the reason that no transfer of the policy sued on herein was made to plaintiff or to the said Caja de Ahorros, or to any other person, with the consent of the defendant, and no notice of any such transfer has been given to the defendant, and the subsistence of the insurance was not requested in favor of plaintiff or the said
56 Caja de Ahorros or any other person by a memorandum endorsed upon the said policy by or in behalf of defendant, and no request was made therefor by any person as required by the conditions of the said policy; and defendant says that the said policy or the said loss thereunder was not transferred nor did it pass or accrue to the said Caja de Ahorros or to the plaintiff from the said Antonio J. Amadeo to whom the said policy was originally issued either by will or by operation of law, and of this defendant puts itself upon the country.

7. For a seventh and further plea defendant says that plaintiff ought not to maintain his aforesaid action because after contracting the insurance by the party to whom the policy was originally issued the risk was materially increased by him to the great prejudice of defendant and without its knowledge or consent by the introduction of operations, business and goods which were hazardous, and because a hazardous trade was established near the said property insured, and this defendant is ready to verify.

8. For an eighth and further plea to the declaration of plaintiff defendant says that plaintiff should not have or maintain his said cause of action because there was no such loss or damage to the amount and in the manner as alleged in said declaration, and of this defendant puts itself upon the country.

9. For a ninth and further plea to the declaration herein defendant says that the plaintiff ought not to have and recover herein because neither the said Antonio J. Amadeo nor any one else, after the happening of the alleged loss or damage by fire to any of the property so insured, did, within fifteen days thereafter, deliver to defend-
ant as particular an account as was reasonably practicable of
57 the several articles or matters damaged or destroyed by fire, and also all other articles and matters insured by the said policy, with the estimated value of each of them respectively, having regard to their several values at the time of the fire; and also of the nature and amount of the loss or damage occasioned to each or any such article or matter and of the interest of the insured therein; and in support thereof such vouchers, proofs and explanations and other evidence which was required by or on behalf of defendant, together with a statutory declaration which was required by defendant of the truth of the account, and of this defendant puts itself upon the country.

10. For a tenth and further plea defendant says that plaintiff ought not to have and recover in this action for the reason that the alleged damage or loss occurred in the building insured in which petroleum oil or coal oil, canfina, benzine, nap-tha and liquids of the same kind were stowed at the time of the said fire without the special permission of defendant endorsed upon the policy or given in any other manner, by reason of which the risk was materially increased and greatly to the prejudice of defendant and by reason of which said fire occurred, all of which defendant is ready to verify.

11. For the eleventh and further plea defendant says that plaintiff ought not to have and recover herein for the reason that the claim made by the insured was false and fraudulent in many material respects, and that the fire occurred by incendiarism resulting from the negligence and conduct of the insured, and this defendant is ready to verify.

12. For a twelfth and further plea to the declaration defendant says that the plaintiff ought not to have and recover herein for the reason that after the claim for loss and damage under the said policy of insurance had been refused by defendant by reason of the
58 failure to present proper statements and proofs of loss as herein and in other pleas set forth, and as by the conditions of the said policy were required, and because of the false, fraudulent and insufficient character of the said claims, no judicial action was brought to enforce such claim within the term of three months after such refusals, all of which defendant is ready to verify.

13. For a further plea to the declaration of plaintiff defendant says that plaintiff ought not to recover herein for the reason that at the time of the execution of the said mortgage by the said Antonio J. Amadeo to the said Caja de Ahorros the said policy of insurance had been prior to that date, and on the third day of September, eighteen hundred and eighty-four, assigned, transferred, pledged and hypothecated to the Crédito Mercantil, a bank at San Juan, Porto Rico, by the said Antonio J. Amadeo, who was at that time the owner and holder of the said policy, (free) from claim of the said Caja de Ahorros or any other person, and that at the date of the execution of the said mortgage inscribed in the mortgage, the said Crédito Mercantil were the owners and holders of the said policy, subject to the payment of an indebtedness of a large amount to it by the said Antonio J. Amadeo, and thereafter defendant avers that the said policy of insurance was duly attached while in the possession and subject to the claims and interest of the said Crédito Mercantil, in a suit instituted by it against the said Antonio J. Amadeo and others in the court of the first instance in the city of San Juan, in the Cathedral district of said city, and later continued before the successor of said court in the said city, as a result of which a judgment was entered by the said court against the said Antonio J. Amadeo and others ordering the sale of the said policy of insurance to satisfy the debt of the said Crédito
59 Mercantil, and thereupon and in pursuance of the said judgment and by the writ thereof of May twenty-second, eighteen

hundred and ninety, the said policy was sold at public auction, and thereafter was adjudicated and awarded to the said Crédito Mercantil as aforesaid, which said adjudication was made in the said court aforesaid on the sixth day of August, eighteen hundred and ninety-one, and thereafter in accordance with the law and practice then existing the judge of the said court, to-wit, Don Eugenio Luzarreti y Conget, executed, on the seventeenth day of September, eighteen hundred and ninety-one, before the notary public Don Mauricio Guerra, San Juan, a conveyance of the said policy and all rights thereunder, free and clear of the rights of all other parties whatsoever, and defendant says that no transfer or assignment of the rights or interest in the said Crédito Mercantil in and to such policy of insurance or the loss thereunder has ever been had or made to plaintiff herein or to the said Caja de Ahorros, all of which defendant is ready to verify.

DEXTER & HORD,
J. M. KEEDY,
Attorneys for the Defendant, The Royal Insurance Company.

UNITED STATES OF AMERICA, *District of Porto Rico*, } ss:

Otto Wantzelius, attorney of Felici & Co., being duly sworn upon his oath says that he is a sub-agent of The Royal Insurance Company, defendant in the above entitled cause, and that the facts set forth in the above plea are true.

P. P. — FELICI & CO.
OTTO WANTZELIUS.

Sworn to before me this 12th day of January, 1902.

A. AGUAYO, *D. C.*"

60 The said amended plea being then and there tendered with said motion, accompanied and supported by the following affidavit of F. H. Dexter, one of the attorneys in this case:

" F. H. Dexter, being duly sworn, upon his oath says that he is one of the attorneys for the defendant in the above entitled cause; that this suit was filed in Ponce April 23rd, 1902, and was served upon the agents of the company in San Juan April 24th, 1902. The summons was returnable to the first day of this court at Ponce, which began May 12th, 1902. Affiant states that inasmuch as the alleged cause of action sued on grows out of a fire which occurred in Porto Rico in February, 1885, and as the defendant company above named has its principal place of business in England, there was presented at the opening of said May term of this court in Ponce, which began on May 12th, 1902, affidavits and a motion for continuance, setting forth that there was no agent or representative of the company in Porto Rico at that time who had any knowledge of this transaction or of the circumstances giving rise to the present

suit; that the fire which gave rise to the alleged loss sued on having occurred seventeen years before that time, that the then agents had either died or departed from Porto Rico and all of the papers in connection with the case had been transmitted to the principal office of the company in England. Thereupon a continuance was granted by this court to the next term thereof, which is this present January term and which began on the 12th day of January, 1903.

Affiant states that said May term, 1902, of this court adjourned on the 24th day of May, 1902, and there has been no session of this court at Ponce since that time. Affiant states that as such attorney, and after the filing of the said suit, he sent cable messages to
61 the principal officers of the company in England advising them of the filing of this suit and requesting information sufficient to base a defense. Owing to the long time since the fire occurred, it was impossible to collect the data and information necessary to found a defense until conference had been had, not only with the officers of the company in England, but also with Mr. Thomas Watlington and Mr. Collins, the adjusters and appraisers who had come to Porto Rico in the year 1885 for the purpose of adjusting the loss, and who are residents of New York city.

Affiant states that in order to obtain the facts upon which to base a defense he went to England in the month of July, 1902, that being the first opportunity he had therefor, as this court was in session in San Juan until about the 21st day of June, 1902. Affiant states that upon arriving in New York in July last he immediately consulted with said Thomas Watlington and thence proceeded immediately to London and Liverpool, England, to consult with the officers of the defendant company; that it was not until he had arrived in England and had made a careful examination with the officers and attorneys of the company that he obtained the information upon which to base the 13th plea contained in the amended plea tendered at the opening of this court on January 12th, 1903, and which is now tendered separately as an amended plea to the original plea filed herein at the last May term of this court. Affiant states that although he received the information upon which to base the plea which is now tendered, still it was not possible to ascertain from the records in Porto Rico the exact facts until after he returned from England, which was in September, 1902, and thereupon affiant applied to the secretary of the district court of San Juan, who is the official archivist of Porto Rico, for the
62 records which would disclose the adjudication of the policies in question and sued on, to the Crédito Mercantil. Affiant states that search was instituted in the office of said district court, and also in the office of the commissioner of the interior where the old records have been stored, and although large sums of money have been expended in paying extra clerks and overhauling these records, and all of the clerks and officials in both offices have been employed almost constantly since September last, affiant was not able to obtain the information desired until the month of December just prior to the opening of the January term of this court, and affiant states

that this January term of court is the first opportunity at which such plea could be filed.

The court thereupon refused to permit or allow the filing of the said amended plea in its present form,

To which ruling of the court defendant at the time then and there excepted.

63 The plaintiff offered at the beginning of said trial the witness Antonio José Amadeo, and thereupon the defendant objected to the introduction of any testimony in this cause, because under the pleadings herein neither plaintiff has a cause of action or a right to recover against defendant; because at the time of the filing of the declaration herein the plaintiff, Robert Miller, had no cause of action, for the reason that it appears from the pleadings herein that as special master of the Caja de Ahorros he claimed the proceeds of the policy sued upon as mortgagee of certain real estate mortgaged by Don Antonia José Amadeo to it; whereas, by the terms of said policy and the law in force in Porto Rico the said mortgage did not extend to and cover any right to recover the proceeds of the insurance policy sued on, which covered a stock of sugar and molasses, and therefore no interest was acquired in the proceeds of said policy of insurance by the said Caja de Ahorros or Robert Miller, special master; and because the amendment made this day introducing Lucas Amadeo as plaintiff substitutes a new party and an entirely new cause of action, and because the cause of action appears upon the fact of the pleadings herein affirmatively barred by the statute of limitations or the law of prescription in force in Porto Rico.

Which objections of defendant were by the court overruled, and the defendant then and there excepted to such ruling.

Thereupon plaintiffs offered in evidence the insurance policy sued on in this case, which was admitted without objection and marked to the alleged contract rights of the complainant, but without prejufor identification, "Exhibit A. for plaintiff," the said policy being in the words and figures following, to-wit:

64 "Porto Rico, Messrs. Feddersen & Co., agents.

The Royal Insurance Company of Liverpool.

Capital, two millions sterling.

Policy number,	Premium, £20.	Sum insured,
2,647,851.		£1,600.

This policy of insurance witnesseth, that Antonio Amadeo, Esq., estate owner of Quebradas Arenas, Maunabo, P. R. (hereinafter called the insured) having paid to the undersigned as authorized agents of "The Royal Insurance Company" (hereinafter called the company) the sum of twenty pounds sterling, for insuring against loss or damage by fire, as hereinafter mentioned, the property hereinafter described, in the sum or several sums, following, viz:—

£1600.—Say sixteen hundred pounds sterling, on stock of sugar and molasses deposited in the sugar manufactory on the estate "Quebrada Arenas," situate in the district bearing the same name, jurisdiction of Maunabo, which manufactory is constructed of wood, cased with zinc and roofed with zinc—25 % the building itself being insured in the Northern Assurance Company for £2400.

The company hereby agree with the insured (subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the property above described, or any part thereof, shall be destroyed or damaged by fire at any time between the nineteenth day of November, 1884, and four o'clock in the afternoon of the nineteenth day of November, 1885, the company will, out of their capital, stock and funds, pay or make good to the insured the value of the property so destroyed, or the amount of such
65 damage thereto, to an amount not exceeding in respect of each or any of the several matters above specified, the sum set opposite thereto respectively, and not exceeding in the whole the sum of sixteen hundred pounds sterling, and also not exceeding in any case the amount of the insurable interest therein of the insured at the time of the happening of such fire.

In witness whereof, we, two of the directors of the said company, by our authorized agents, have hereto set our hands, and have caused the common seal of the said company to be hereunto affixed. Dated at Porto Rico, this sixteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four and issued there.

(Signed) R. BROCKLEBANK,
E. W. RAYNER,
By their attorneys, FEDDERSEN & CO.,
Agents of the Company.

The conditions referred to in this policy are as follows:

1. Any material misdescription of any of the property proposed hereby to be insured, or of any buildings or place in which property so insured is contained, or any omission to state the existence of any hazardous trade, or of any apparatus in or by which heat is produced other than grates in common fire-places therein, and any misstatement of, or omission to state, any fact material to be known for estimating the risk, whether at the time of affecting the insurance or afterwards, renders this policy void as to the property affected by such misdescription, misstatement or omission respectively.

2. If, after the risk has been undertaken by the company, anything whereby the risk is increased be done to, in, or upon, property hereby insured, or to, upon or in, any building or place in which property hereby insured is contained, or if any property hereby insured be removed from the building or place in which it is herein described as being contained, or if any addition to the risk arise from any other cause whatsoever, without in each and every of such cases, the assent or sanction of the company, signified by en-

dorsement hereon, or if the insured shall refuse or neglect to pay any further premium which may be demanded in consequence of any increase of risk, the insurance as to the property thereby affected ceases immediately thereupon to attach. And if by reason of such alteration and addition, or from any other cause whatsoever, the company or its agents shall desire to terminate the insurance 66 effected by this policy, it shall be lawful for the company or its agents so to do by notice to the insured, or his representative, and to require this policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a rateable portion for the unexpired time thereof of the premium received for the insurance.

3. This policy does not cover property held in trust or on condition unless expressly described as such; nor china, glass, looking glasses, jewels, clocks, watches, trinkets, medals, curiosities, manuscripts, prints, paintings, drawings, sculptures, musical, mathematical and philosophical instruments, patterns, models and molds, unless as specially mentioned in the policy; nor deeds, bonds, bills of exchange, promissory notes, money, securities for money, stamps, books of account; nor gunpowder; nor loss or damage by fire happening during the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, within the country or locality within which the property insured is located, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law. And this policy does not cover loss or damage occasioned by or through any earthquakes or hurricane; or by or through the spontaneous fermentation or heating of the subject insured; nor goods destroyed or damaged while undergoing any process by which the application of fire heat is necessary; nor loss or damage by explosion; except loss or damage to a building or property contained therein, caused by the explosion of gas in such building, not being a building in which gas is manufactured.

4. No insurance proposed to the company is to be considered in force until the premium be actually paid. No receipts for any premiums of insurance shall be valid or available for any purpose whatever, except such as are printed and issued from the company's office and impressed with the seal of the company, and any condition or proviso contained in, endorsed upon, or referred to, in any such receipt shall be taken as part of this policy.

5. This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person, otherwise than by will or operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by memorandum endorsed hereon by, or on behalf of the company.

6. On the happening of any loss or damage by fire to any of the

property hereby insured, the insured must forthwith give notice in writing thereof to the company, and within fifteen days at latest deliver to the company as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by fire, and also of all other articles and matters insured by this policy with the estimated value of each of them respectively, having regard to their several values at the time of the fire; and also of the nature and amount of the loss or damage occasioned to each or any such article or matter, and of the interest of the insured therein; and in support thereof give all such vouchers,
67 proofs and explanations and other evidence as may be reasonably required by or on behalf of the company, together with, if required, the statutory declaration of the truth of the account; and in default thereof, no claim in respect of such loss or damage shall be payable or sustainable unless or until such notice, accounts, proofs, and explanations or evidence respectively shall have been given and produced as aforesaid, and such statutory declaration, if required, shall have been made.

7. No profit or advantage of any kind is to be included in any claim for loss or damage under this policy, and if the claim be in any respect fraudulent, or if any false statutory declaration be made or used in support thereof, or if the fire be occasioned by or through the procurement or with the knowledge or connivance of the insured, all benefit under this policy is forfeited.

8. In case of damage by the removal of property to escape a conflagration, this company will contribute thereto in proportion of the sum insured hereby shall bear to the whole value of such property before removal; but the company shall not be held liable for property stolen.

9. The company may, if they think fit, at their option, reinstate or replace the property damaged or destroyed, instead of paying the amount of the loss or damage, and may join with any other company of insurers in so doing in cases where the property is also insured elsewhere.

10. On the happening of any damage by fire to any building or place, or property or effects within any building or place, in respect of which a claim is, or may be made, under this policy, the company, without being deemed wrongdoers, may, by their authorized officers and servants, or others, enter into, and for a reasonable time remain in possession of, such building or place, property, or effects for all reasonable purposes relating to, or in connection with, the insurance hereby effected, and this policy shall be evidence of leave and license and authority for that purpose.

11. The insured must give notice to the company of any insurance or insurances made elsewhere on the property hereby insured, or any part thereof, the particulars of which must be endorsed on the policy, and unless such notice be given and endorsement be made the insured will not be entitled to any benefit under this policy.

12. If at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance

or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute in respect of such loss or damage more than its regular proportion of such loss or damage.

13. In all cases where any other subsisting insurance or insurances, whether effected by the insured or by any other person, on any property hereby insured, either exclusively or together with any other property, in and subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner.

68 14. If any difference shall at any time arise between the company and the insured, or any claimant under this policy, as to the amount of any loss or damage by fire, and no fraud be alleged, every such difference as and when the same arises, shall be referred to the arbitration and decision of two indifferent persons, one to be chosen by the party claiming and the other by the company; or in case of disagreement between them, then of an umpire to be chosen by the arbitrators before entering on the reference—provided that if one of the parties fail to name an arbitrator within ninety days after being called upon by the other party to do so, subsequently to the furnishing of the proof and evidence and other matters as stipulated by the foregoing condition number 6, then in such case shall the other party be at liberty to choose both arbitrators, who shall agree upon an umpire before entering on the reference—and the costs of the reference shall be in the discretion of the arbitrators or umpire, as the case may be, who shall award by whom and in what manner the same shall be paid; and the decision of the arbitrators or umpire, as the case may be, shall be final and binding on all parties and this condition shall be deemed and taken to be an agreement to refer as aforesaid. And it is hereby expressly stipulated and declared that the obtaining of any award by such arbitrators or umpire as the case may be, shall be a condition precedent to the liability or obligation of the company to pay or satisfy any claim under this policy for loss or damage in respect of which any such difference may have arisen, and to the enforcement of any such claim.

15. In all cases where this policy is void, or ceases to be in force under any of the foregoing conditions, all monies paid to the company in respect thereof will be forfeited.

16. The directors of the company shall not be sued nor made personally responsible for this insurance until the funds of the company are first exhausted; and the agents shall in no case be responsible, either on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the company; nor can their personal property be attached on account of any alleged loss by the insured.

17. If in any case the company shall be unable to reinstate or repair the buildings, because of any provisions in the acts in force for regulating the alignment of streets or the erection of buildings, the company shall in every such case, only be liable to pay

such sum as would be requisite to reinstate or repair such buildings, if the same could lawfully be reinstated to their former condition.

18. It is hereby declared and agreed that if the property covered by this policy shall, at the breaking out of any fire, be collectively of greater value than the sum insured thereof, then this company shall pay, or make good such a proportion only of the loss or damage as the sum so insured shall bear to the whole value of the said property at the time when such fire shall happen.

69 Plaintiff also offered in evidence a certified copy of the appointment of Mr. Robert A. Miller as special master in this case, which was objected to by the defendant for the reason that said Miller as special master has no right to recover herein, which objection was overruled by the court and exception taken then and there by defendants.

Plaintiff also offered in evidence the mortgage given by Don Antonio José Amadeo to the Caja de Ahorros, which said mortgage, duly translated, is in the words and figures following, to-wit:

"Voluntary mortgage executed by Don Antonio José Amadeo y Antonmarchi in favor of the Caja de Ahorros, of this city, before the ex-notary of this city, Don Joaquin Mayoral, in Ponce, Porto Rico, on the 19th day of September, 1884.

"Voluntary mortgage number two hundred and seventy-six.

"In the city of Ponce, island of Porto Rico, on the 19th day of September, 1884, before me Don Joaquin Mayoral, notary of the college of the province, residing and having an office in this city, and before the witnesses which shall hereafter be mentioned, there appear:

"As party of the first part Don Antonio José Amadeo y Antonmarchi, single, resident of Maunabo, plantation owner, 40 years of age, with his cédula of the 5th class, number 4.

"As party of the second part, Don Francisco Barnés y Vallenilla, of this vicinity, married, property owner, fifty years of age, with his cédula of the 3rd class, No. 1; both of such cédulas of the current fiscal year, which I have had before me and I have returned to them. The latter party set forth that he appears in his
70 character of director-president of the 'Caja de Ahorros' of this city, to which office he was appointed at the general meeting of the shareholders held on the 17th day of December, 1881, and re-elected on the 31st day of the same month of the year 1882, as he proves it with the two original minutes existing in the minute book, which I certify to have before me, the same having been exhibited to me by the said Señor Barnés, to whom I returned it; which individual, according to article 48 of the rules of the said association 'Caja de Ahorros'—which rules I have also had before me—is authorized as such president to represent the association in all judicial and extra judicial actions.

"I certify as to the identity, profession and vicinity of the parties appearing, and they assuring to be in the enjoyment of their civil rights; I, the notary, considering that they have the legal capacity necessary for this contract, they set forth the following facts:

"First. Property.—That the party appearing, Doctor Don Antonio José Amadeo, is the legitimate owner of a sugar plantation called 'Quebrada Arenas,' situated in the barrio of the same name, municipal district of Maunabo, composed of one hundred and ninety-four cuerdas, twenty-seven and one-third one-hundredths of another cuerda of land, equivalent to seventy-six hectares, thirty-five ares, seventy-two centares, all planted in cane with the exception of the land occupied by the buildings, yard and lanes, and bounded on the north by the properties of Don Antonio Navarro and Messrs. Clausell Bros.; on the south by the lands of Manuel Martinez Curro, Felix Fontanez, the brook called 'Quebrada Arenas,' Merced de Santiago, Dominga and Evangelista Martinez; on the east by the lands of Daniel Gregorio Auraro, Don Felipe Ramos, and
71 pasture lands of the grantor Don Antonio José Amadeo, and on the west by other lands, also pasture lands of the same Mr. Amadeo.

"The said property contains, in addition, the proper establishments for the manufacture of sugar, which is composed of a warehouse for sugar built of wood, with walls and roof of iron; a steam engine of 20-horse-power, with its house, also built of wood, and roof, and lined with iron; a cooper shop built of wood, iron roof; a rum-house, with apparatus for distillery, also built of wood, being roofed and enclosed with iron; one dwelling house, all of wood; all of which establishments, with the exception of the dwelling house, are insured against fire by the companies Northern Insurance Company of London and Royal Insurance Company, as per policies which he holds in his possession.

"Titles.—The said property was acquired by the grantor, Señor Amadeo, in this form:

"One hundred and twenty-six cuerdas and twenty-five one-hundredths of another through purchase from Mr. Victoriano Dávila, as per deed executed in the town of Guayama before the notary Don José Mariano Capó, on the 26th day of May, 1877;

"Fifteen cuerdas through purchase from Don Manuel Matos y Sanchez, as per deed executed in Maunabo before the notary of arroyo Don Sebastian Muñoz y Rivera on the 13th day of November, 1881;

"Thirty-three cuerdas and thirty-three and one-third one-hundredths of another through purchase from Don Otto Riefkohl y Baetke, as per deed executed in Maunabo on the 3rd day of August, 1882 before the same notary, Mr. Sebastian Muñoz;

"Six cuerdas and sixty-nine one-hundredths of another
72 through purchase from Don Pedro Quintana y Perez, as per deed executed in the same town and before the same notary on August 16th of the same year, 1882;

"And the last thirteen cuerdas through purchase from Don

Ramón León y Suya, as per deed which they executed on the 1st day of December of the same year, 1882, in the said town of Maunabo and before the said notary Don Sebastian Muñoz; certified copies of which deeds I have before me and appear of record in the registry of property of Guayama in this form:

"The first at folio 10 of volume 2 of the municipality of Maunabo, property No. 48, first registration.

"The second at the reverse side of folio 178, volume 1 of the same municipality, property No. 32, second registration.

"The third at folio 100 of the same volume and municipality, property No. 20, third registration.

"The fourth at the reverse side of folio 21 of volume 2 of the aforementioned municipality, property No. 50, second registration.

"And the fifth and last at folio 46, volume 2 of the municipality of Maunabo, property No. 56, second registration.

"Which said portions together constitute the sugar plantation which has been described, which is crossed from north to south by a country road of the barrio, in which form the registration in the registry of property should be made at the time of registering the present deed, as also the establishments and house which are situated in the said plantation belonging to the grantor, because all of it has been developed at his expense.

"Liens.—Of the titles exhibited, the only ones which the
73 relator assures to have, no liens, burden or incumbrance appears on the property, which he affirms to be free from all responsibility, as he offers to prove with the corresponding certificate from the registry of property of Guayama, which he will exhibit in this notarial office duly set forth.

"Value.—By common agreement between the said contracting parties they have appraised the said plantation in the sum of sixty thousand pesos current commercial money.

"Second. That Señor Amadeo being indebted to the 'Caja de Ahorros' of this city in the sum of $15,036.27, which was advanced to him as a loan to attend to the development and keeping of the aforementioned property for the term and under the interest and conditions which shall be hereinafter set forth, he has agreed with the party appearing, Don Francisco Barnés, in his character as director-president of the 'Caja de Ahorros' to secure the aforementioned credit with a first mortgage on the plantation above referred to. In consequence whereof, so that these obligations might be registered in the registry of property, they enter into the present deed of voluntary mortgage, under the following clauses and conditions:

"First. Don Antonio José Amadeo y Antonmarchi acknowledges to have received before this act in cash from the 'Caja de Ahorros' of this city the amount of fifteen thousand and thirty-six dollars and twenty-seven cents, current commercial money, which has been advanced to him as a loan. In virtue whereof I, the notary, declare, for the knowledge of the contracting parties, that the payment of the money of this loan having been acknowledged as it has

been acknowledged, there cannot be any exceptions taken against the certainty of said acknowledgement, the property being liable for the obligations of this contract and the right of mortgage free from all responsibility, even though it should be shown hereafter
74 that the delivery was not made in whole or in part.

"Second. This loan was made at the interest of one per cent. per month, which shall accrue to the capital only in case of delay, and to be reckoned from the date of maturity of each one of the payments which shall be stipulated up to the day that the payment should be made; and for this reason it cannot be understood in any way that the association, the creditor, is bound to grant any extension of time to the debtor.

"Third. This mortgage shall continue for a term of six months, which will become due on the 17th day of March of the incoming year of 1885.

"Fourth. The payment of the amount of $15,036.27 of the capital of the said loan shall be made by the debtor, Mr. Amadeo, in two instalments, to-wit: $7,482.51 on the 17th day of February, 1885, and the other amount of $7,553.76 on the 17th day of March of the same year, which amounts shall be paid at the residence of the association 'Caja de Ahorros,' which, for the purposes of this contract, is fixed at the west side of the principal plaza of this city, where it is at present established, or at such a place as may be occupied by the same on the dates above referred to, of which due notice shall be given to the debtor, who, by himself, appoints this city, waiving expressly his residence, for all purposes and proceedings which may originate from this contract.

"Fifth. The creditor, the association, is free from the payment of all taxes or duty which may be imposed on the capital of the said loan, and all shall be for account and the expense of the debtor Don Antonio José Amadeo.
75 "Sixth. As guarantee of this loan the grantor Don Antonio José Amadeo, constitutes a voluntary mortgage on the property described and the fruits thereof for the amount of $15,036.27 which he has received; for 1000 pesos to answer to the interests which, in case of delay, might accrue; and for 3,000 pesos more to cover costs in the event of litigation, with which incumbrance the property shall remain until this obligation shall have been completely cancelled.

"Seventh. The party appearing, Don Francisco Barnés y Vallenilla, in his character as director-president of the association 'Caja de Ahorros' accepts this deed in the form in which it is made.

"In this state I, the notary, declare to have given to the contracting parties the following warnings:

"First. That although they had the right to stipulate the interest without being subject to any legal rate, yet no such interest will be insured except as appears from the present deed and from the registration of the same in the registry of property. The creditor not being able to claim through real mortgage action to the prejudice of a third party interest in arrears in excess of such as belongs to

the two preceding years, and the part due for the current year, although he shall have the right to maintain personal action against the debtor to demand such interest as belongs to preceding years, and further to ask for an extension of the mortgage if necessary.

"Second. That all later mortgages shall be postponed to this first obligation, as agreed to between the parties, it being understood that if said mortgage shall have to be paid before the present mortgage, the property being sold, the total of the present obligation shall be deducted first, and only the resulting amount in ex-
76 cess shall be applied to the other mortgage due.

"Third. That the preferred legal mortgage in favor of the State, the province and the municipality of Maunabo is reserved over any other creditor for the collection of the last annual payment of taxes assessed and not paid on the mortgaged property.

"Fourth. The same exception is made in favor of the insurance companies of the mortgaged establishments for the corresponding premiums to the two preceding years, should they not have been paid.

"Fifth, and lastly. That this deed must be entered in the registry of property for the district of Guayama, without which requisite it shall not prejudice a third party, nor shall it be admitted before any court, council or office, except in cases and form established by law; under which clauses and conditions they enter into the present deed, which they bind themselves to keep and fulfill in the most solemn form under the penalty of incurring the corresponding responsibilities.

"It was so stipulated and signed together with the witnesses present, Don Mario Mercado and Don Lorenzo Padró, having first read this deed to them, advising them of their right to do so by themselves, which they waived; to all of which I, the notary, certify.

"ANTONIO JOSÉ AMADEO.
"FRANCISCO BARNÉS.
"M. MERCADO.
"L. PADRO.

"(Signated) JOAQUIN MAYORAL, *Notary.* [RUBRICATED.]

"NOTES.—On the 30th day of September, 1884, on petition of Don Francisco Branés, I issued first copy on four sheets of paper, the first of the seal one and the remaining of the eleventh. I certify.

"MAYORAL. [RUBRICATED.]

"As substitute of the proprietor, lawyer Don Rosendo Matienzo Cintrón, on the 8th day of February, 1901, I issued for law-
77 yer Don Carlos M. Boerman first copy in six sheets of common paper. I certify.

"LEÓN. [RUBRICATED.]

"It is a true and faithful copy from the original which under No. 276 is found in the protocol of public instruments of the year referred to, and of this notarial office actually under my charge through the absence of its proprietor, in use of leave of absence, and to which protocol I refer.

"In testimony whereof, and upon petition of lawyer Don Henry F. Hord, I issue the present first copy for him in six sheets of common paper, which I rubricate, signate and sign in Ponce on the 31st day of December, 1902.

"[NOTARIAL SEAL.] (Signed) ANGEL ACOSTA.

"50c. revenue stamp.

"The foregoing is a true and correct translation of its original in Spanish, to which I certify.

"Z. VALL SPINOSA,
"*Interpreter U. S. Dist. Court, P. R.*"

To the introduction of this mortgage defendant objected, for the reason that by its terms no right or interest was acquired by the Caja de Ahorros or by plaintiff Miller as special master in and to the policy of insurance sued on herein, which objection was by the court overruled and the defendant then and there excepted.

Don ANTONIO JOSÉ AMADEO gave evidence tending to prove that in the years 1884 and 1885 he was the owner of a sugar plantation called "Quebrada Arenas" near Maunabo, Porto Rico; on the 15th day of September, 1884 there was issued to him by Messrs.
78 Feddersen & Company, general agents of the defendant at that time in Porto Rico, the policy of insurance sued on, for the sum of sixteen hundred pounds sterling and covering the stock of sugar and molasses in the warehouse of his estate "Quebrada Arenas," the said building being insured in the Northern Assurance Company of London for twenty-four hundred dollars. He paid the premium on the policy when issued, and on the night of the 6th or 7th of February, 1885 the stock of sugar and molasses so insured and in the warehouse aforesaid was entirely destroyed by fire, including the stock of sugar and molasses insured under the policy sued on in this case. The fire was between eleven and twelve o'clock at night on the 6th and 7th; witness was not present at the time, being in the town of Maunabo, four or five kilometers distant. He gave evidence that he notified the company's agents, Feddersen & Company, the next morning after the fire. A commission came from San Juan, sent by the general agents, Feddersen & Company, who made inventories and carried everything with them to San Juan; they came a few days after the fire; they came with the experts whom I do not now recollect, and made examinations; they were appointed by Mr. Jeannot, Señor Lovellet, Mr. Clyde, Don José Ortiz, Mr. Schwartz, also an engineer and masons and carpenters; they took notes and made inventories and investigations about the loss of the fire; they made all of these documents and put them in

a sack and carried them to Feddersen & Company, and these documents must be there; these which they made were specific and in detail and contained all the amounts of the stock of sugar and molasses; they counted the value at the time of the stock of sugar and molasses lost; there was about 180 hogsheads of sugar, 20 hogsheads in pans cooling off, 50 hogsheads of molasses and 50 barrels of sugar; there are two quintals of sugar to a barrel; the hogsheads were big
79 ones and had between 15 and 16 quintals each; in a hogshead of molasses there are from 135 to 140 gallons. More or less these were the statements made at that time, and they were made on that calculation. At that time a quintal of sugar was worth from $2.75 to $3.00 Mexican money, and a gallon of molasses from 30 to 50 cents Mexican money. I made those statements at the time. The commission from the agents in San Juan carried an invoice and inventories to San Juan; I signed it and the other men that came from San Juan did also. The two agents were Mr. José María Ortiz, a man called Clyde, and another called Schwartz, and some carpenters and other people. About two or three months after the fire an adjuster of the company named Mr. Watlington came down from New York; he was there taking measurements, making investigations and examining; I do not know what he did; he went away a few days afterwards, but he was there taking statements and investigations. A few months afterward I had a conversation with the general agents, Feddersen & Company, in San Juan, on the question of the claim, after the adjuster had left; my conversation was with Mr. Duplace, a partner of the house of Feddersen & Company, the general agents of the company.

Defendant, by its attorneys, objected to any statements made to witness by the said Duplace, for the reason that the said Duplace is now dead, and was, at the time of the alleged conversation sought to be offered in evidence, a general agents of defendant company.

Whereupon, the court ruled that the witness might testify
80 as to the fact that he made a demand for the payment of the claim upon that agent, and that he would not extend the testimony any further than that.

To which ruling of the court the defendant then and there excepted.

Continuing, the witness stated that the agents told him they were no longer the representatives of the company.

Whereupon, defendant, by its attorneys, objected to said testimony as being a conversation had with the deceased agent, Duplace, and, therefore, not competent.

Whereupon, the court ruled: "I believe I will permit you to prove that they, the former agents, notified him that they were no longer the agents of the company, without proving any conversation.

To which ruling of the court defendant, by its attorneys, excepted, for the above reasons, and for the further reason that evidence of an

alleged agent could not be admitted to prove his authority as to any given matter.

Witness stated that he did not know about any more representatives of the company in the island.

He gave evidence that he had given the policy of insurance sued on as collateral security to the Crédito Mercantil and that he
81 had also mortgaged his property to the Caja de Ahorros, which said mortgage he did not pay. He also gave evidence as follows:

"A few months or a year after, or two years perhaps, I do not recollect the time well, I went to New York; I passed through New York and had a conversation with the adjuster, Mr. Watlington, in the house of Mr. Henry Beste, a merchant of New York.

Q. You say that was about two years afterward?

A. Yes.

Q. That would be in 1887, would it?

A. Yes.

Q. What month?

A. In May.

Q. What happened?

A. I had a conversation with Mr. Watlington in the office of Mr. Beste of New York. I was in the office of Mr. Beste with Mr. Watlington, and Mr. Watlington after some discussion and talk offered me twenty-five thousand dollars in settlement of my policies of insurance.

Defendant, by its attorneys, then and there objected to the testimony of the witness as to the alleged conversation with the adjuster Watlington, for the reason that it had not been shown that at the time the said Watlington was authorized to represent the company or to bind it in any way, or was employed by it, and that the witness Amadeo was bound to take knowledge of the want of authority or right of said Watlington to speak for or bind defendant company at the time.

Which objection, being overruled, defendant then and there excepted.

82 Q. Of all your policies of insurance?

A. Including all my policies belonging to him. I refused this offer.

The same objection being made, the court overruled the same, To which defendants then and there noted an exception.

Q. Then from New York where did you go?

A. I started in the same month for London.

Q. How long were you in London?

A. About fifteen months.

Q. That would bring this up to about the fall of 1888?

A. Yes.

Q. What did you do in London with reference to this claim?

A. I was trying to settle with the company. I went to the office

myself every week, sometimes twice a week, to see if I could settle with them. I was obliged to come back for want of money; I myself made personal claim on the company.

Upon cross-examination witness testified:

That Mr. Best was now living in New York; that last year witness had seen him in the French hotel at Ponce, Porto Rico, and did not know whether his deposition was taken for use in this case or not.

Witness stated that Mr. Beste sent for Mr. Watlington to get a settlement of the matter in his office, and that Watlington offered him $25,000.00 for his policies.

Defendants objected to this testimony for the reasons before stated, and for the further reason that it was in connection with an effort to compromise the claim of witness.

Which objection being overruled, defendant then and there excepted.

83 Witness testified that he had five policies of insurance at the time of the fire, and that he did not know exactly how many policies of insurance his brother Federico had upon the property at the time of the fire.

The sugar and molasses which were destroyed were in the sugar house, the boiler room, pans and machinery being in one end of the same building. Don Federico Amadeo, his brother, lived on the estate; he had a house and shop there.

Attorney for defendant, offering a copy of letter to witness, which witness identifies as having received a few days after the fire from the agents Feddersen & Company, in which they acknowledge receipt of his letter acquainting them of the destruction of his property by fire, and informing him of the vouchers and details required by the company in such cases, which letter was introduced by defendant and marked "Exhibit 1."

Witness further testified as follows:

"A few days after Mr. Watlington, the adjuster, left, I went to San Juan and I saw the agents there, Feddersen & Company, and they told me they were no more the general agents of the company and I would have to go to London to make the claim.

Whereupon, defendant, by its attorneys, objected to this testimony and asked to have the same stricken out for the reason that
84 such testimony purported to be a conversation with the deceased agent of the company, Mr. Duplace, and therefore not competent.

Which objection the court overruled, and thereupon defendant then and there noted its exception.

Witness stated that this conversation was about two years after Mr. Watlington had left for New York.

Upon redirect examination witness testified:

That the general agents themselves did not come to his place to investigate the loss after the fire, but sent a procurador, a kind of lawyer, and the sub-agent from Arroyo, and that they with witness and some experts made an inventory; that in the letter "Exhibit 1" offered by defendant, he was requested to give approximate estimates of the losses in respect to the values of the properties burned, and also the value of the stock existing up to that time, which information witness stated he gave, as well as a copy of the court's sentence and the verbal proceedings had to ascertain the cause of the fire, which was also required by the company.

Don PEDRO JUAN BATTISTINI, a witness called on behalf of plaintiff, gave evidence tending to prove that in the year 1898 he went to the office of the company at Liverpool and asked them if they would pay the policy sued on, or come to some settlement; they did not pay it; this was done as a "piece of business that I made with Lucas Amadeo, the brother of Don Antonio;" this was in August 1898.

On cross-examination witness stated that while in Liver-
85 pool he saw the secretary of the defendant company who told him (witness) that he (the secretary) did not want to hear anything about the policy, and declined to hear or propose any arrangement of settlement; nothing else was said about the policy and he was the only man connected with the company that witness saw in connection with collecting the policy. The company absolutely refused to speak any more about the matter.

Thereupon defendant, by its attorneys, moved the court to direct a verdict for the defendant, for the reason that the plaintiffs had no right to recover under the pleadings and proof herein.

Which motion the court overruled, and thereupon the defendant, by its attorneys, noted its exception.

Defendant thereupon offered in evidence the deposition of one Herbert Stanley Ardran, of London, England, taken under a commission previously issued out of this court. The same being submitted to the court at its request, the court, of its own motion, struck out certain parts of the same, which said deposition and the parts thereof so stricken out literally copied is as follows, the parts stricken out being indicated by being in parenthesis and underlined:

"District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY. } Common Law. No. —.

86 The deposition of Herbert Stanley Ardran, of No. 22 Osborne road, Anfield, Liverpool, England, a witness of lawful age produced, sworn, and examined upon his corporal oath on Tuesday, the thirtieth day of December, one thousand nine hundred and two, at the office of Messrs. Duff, Watts and Company, number five Nicholas lane, in the city of London, England, notaries public, by me, Henry George Bishop, notary public, a commissioner duly appointed by commission issuing out of the district court of the United States of America for Porto Rico, dated in the city of San Juan the ninth day of December, 1902, with the seal of the said court attached and under the hand of Ricardo Nadal, clerk, by H. H. Scoville, deputy clerk, and to me directed, for the taking of testimony of witnesses in behalf of the defendant in the case of Robert Miller, special master, *versus* Royal Insurance Company, now pending undetermined in said district court, touching the premises, on the interrogatories which were attached to the said commission, I, the said Henry George Bishop, before beginning the examination of witness, having taken and subscribed to an oath in due form before a notary public faithfully to comply with said commission.

The said HERBERT STANLEY ARDRAN being by me then duly sworn as a witness to the said cause previous to the commencement of his examination to testify the truth on the part of the defendant in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, testified and deposed as follows:

Interrogatory No. 1. State your name, age, occupation and residence?

Answer to interrogatory No. 1. Herbert Stanley Ardran, 38 years of age, auditor of foreign claims in foreign department of
87 Royal Insurance Company, 22 Osborne Rd. Anfield, Liverpool, England.

Interrogatory No. 2. State what official position you hold with The Royal Insurance Company, defendant, and how long you have held such position; also what are your duties in that capacity?

Answer to interrogatory No. 2. Auditor of foreign claims, since October 1887, to examine and deal with the foreign claims.

Interrogatory No. 3. How long have you been connected with the Royal Insurance Company?

Answer to interrogatory No. 3. Since April, 1885.

Interrogatory No. 4. Have you any knowledge of the foreign business of such company and specially the business of your company in Porto Rico?

Answer to interrogatory No. 4. Yes.

Interrogatory No. 5. Are you familiar with the facts and circumstances connected with an alleged claim against defendant growing out of policy issued by defendant to Antonio J. Amadeo, September 15, 1884, the said policy being number 2,647,851 and issued for the sum of sixteen hundred pounds sterling such policy being in continuation of policy number 2,647,820 having reference to such facts or circumstances (as) may have occurred after the destruction of the property insured by such policy in the month of February 1885?

88 Answer to interrogatory No. 5. Yes.

Interrogatory No. 6. Please state the reasons why defendant company has refused and still refuses to pay the alleged loss growing out of the said policy of insurance above described?

Answer to interrogatory No. 6. First, that no definite claim has ever been made upon the company in respect of the loss and damage to the property insured; (*second, that no such claim or account as is required by the sixth condition of the policy was delivered to the company within fifteen days or at all and that condition has not been complied with;*) third, that the insured was required by the company to furnish invoices of the property destroyed or damaged and to affix to all the statements a statutory declaration but did not do so; fourth, that the insured was notified on the 23rd of April and 6th of May 1885 that the documents presented as proofs of the losses by the fire were not in due form and were refused as not satisfactory to the company. The insured declined to give any further proofs and abandoned any claim which he might have upon the policy.

Interrogatory No. 7. State whether defendant company has ever admitted its liability for the loss alleged to have been suffered under the said policy of sixteen hundred pounds above referred to?

Answer to interrogatory No. 7. No.

Interrogatory No. 8. State if defendant company acknowledged or agreed to pay to plaintiff in this suit or any person claim-
89 ing to own the said policy the amount thereof on account of the said loss?

Answer to interrogatory No. 8. No.

Interrogatory No. 9. State what conditions of the said policy of insurance were violated by the holder of the said policy either before or after the fire.

Answer to interrogatory No. 9. The sixth condition.

Interrogatory No. 10. Explain fully in what manner the holder of the said policy failed to comply with the conditions thereof relative to giving notice and the making and furnishing of proofs of loss as provided in said policy after the fire.

Answer to interrogatory No. 10. I refer to my answer to No. 6 interrogatory.

Interrogatory No. 11. State if defendant company called the attention of the then holder of the said policy of insurance to said defects in the notice of the proofs of loss and if so please state the

date thereof and what objections were made then and there to such proofs of loss by the defendant.

Answer to interrogatory No. 11. Yes, the company's agent did so in their letters to the insured of the 23rd of April 1885 and the 6th of May 1885.

(*Interrogatory No.* 12. *State whether the then holder of the said policy or any one for him then or at any time since has complied with the conditions of the policy and the directions given by your company*
90 *as aforesaid in the matter of presenting proper proofs of loss.*

Answer to interrogatory No. 12. *No.*)

(*Interrogatory No.* 13. *State if defendant company has at any time since the said fire released the holder of the said policy from complying with such conditions as to proofs of loss or has waived the same in writing or otherwise.*

Answer to interrogatory No. 13. *No.*)

(*Interrogatory No.* 14. *State if the refusal of defendant company to pay the loss under the said policy of insurance as heretofore referred to was based upon any other grounds than the failure of the holder of the said policy to furnish proper proofs of loss as provided in said policy or for other reasons than the specific violations of the conditions of said policy as therein set forth and which related to matters occurring after the fire.*

Answer to interrogatory No. 14. *No.*)

(*Interrogatory No.* 15. *State if there has been furnished to the company since the said fire in writing and within fifteen days thereafter as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by the fire and also of all other articles and matters insured by said policy with the estimated cash value of each of them respectively at the time of the fire and also of the nature and amount of the loss or damage occasioned to each or any of the said articles or matters and of the interest of the assured therein and in support thereof whether there has been given all such vouchers, proofs and explanations as were required by the defendant company.*

Answer to interrogatory No. 15. *No, not at any time.*)

91 (*Interrogatory No.* 16. *State whether any such claim was made within three months after the fire.*

Answer to interrogatory No. 16. *No.*).

Interrogatory No. 17. State whether any such claim or proof of loss has ever been presented to the defendant company.

Answer to interrogatory No. 17. No.

(*Interrogatory No.* 18. *State whether after the refusal to pay the loss under such policy or claim thereunder any action or suit was commenced against defendant company by the holder of said policy within three months after such refusal or rejection.*

Answer to interrogatory No. 18. *No.*)

Interrogatory No. 19. Who were the general agents of the defendant company in Porto Rico in 1884 and 1885?

Answer to interrogatory No. 19. Messrs. Feddersen, Willinck & Co., and Messrs. Feddersen & Co.

Interrogatory No. 20. How long were such persons acting as general agents of defendant company?

Answer to interrogatory No. 20. Messrs. Feddersen, Willinck & Co. from the 15th January 1880 to the 15th February 1884; Messrs. Feddersen & Co. from the 15th February 1884 to May 1889.

Interrogatory No. 21. Who succeeded them in Porto Rico as general agents of defendant company?

92 Answer to interrogatory No. 21. Messrs. Sobrinos de Ezquiaga from May 1889 to the present time.

Interrogatory No. 22. Who are the present general agents in Porto Rico of defendant company?

Answer to interrogatory No. 22. Messrs. Sobrinos de Ezquiaga.

Interrogatory No. 23. Did defendant company have any other agents in Porto Rico than those whose names have just been testified to?

Answer to interrogatory No. 23. No.

Interrogatory No. 24. State whether defendant company failed to require the giving or furnishing of proofs of loss as provided in said policy of insurance herein above referred to containing such particulars as were provided by said policy to be given to the company or that defendant company absolutely refused to pay anything at all on said loss for the reason that the fire was of incendiary origin and that it would not pay under any circumstances.

Answer to interrogatory No. 24. No, the company did not fail to require such proofs nor did they ever refuse to pay anything for the reason that the fire was of incendiary origin nor that they would not pay under any circumstances.

Interrogatory No. 25. State whether any notice was given to

93 *defendant company or its agents of the transfer or assignment of the said policy of insurance by or from Antonio Amadeo the person to whom it was issued, to any other person or corporation.*

Answer to interrogatory No. 25. The company have received only the following notices namely:

10th of May 1885. *Mr. Watlington in his letter of that date to Mess. Dawes & Sons the defendant company's solicitor states that the claims have been assigned to a brother Mr. Lucas Amadeo of Ponce. One of the creditors of Antonio a bank at Ponce known as Caja de Ahorros has commenced a suit claiming a prior lien upon the property and an order of the court has been served upon your agents restraining them from paying the assignee.*

15th Aug. 1886. *Notice by Antonio J. Amadeo not to pay any policy concerning the property destroyed by fire.*

15 *Aug.* 1887. *The like notice by Federico Amadeo.*

10th April 1887. *Letter from the director of the Sociedad Anónima de Crédito Mercantil San Juan to Messrs. A. Ruffer & Sons of 39 Lombard Str't London that Mr. Amadeo had deposited policy No.* 1095473 *in the Northern Assurance Company and policy No.* 2647851 *in my company in guaranty of a business transaction with the bank.*

15th December 1887. *Notice from Messrs. Ruffer & Sons requesting*

that no money or moneys be paid in settlement of the claim they having on behalf of the bank a first claim on the said policy No. 2647851.

21*st Feb'y* 1888. *Certificate of Don Nicolas S. Arana y Guerrero notary public of Guayama Porto Rico.*

21*st April* 1888. *Letter from Messrs. Feddersen & Co. that they*
94 *had been notified of an embargo on the insurance money of the brothers Amadeo on account of Messrs. Sainz, Cerra & Co. of San Juan.*

8 *May* 1888. *Notice of assignment of policy dated 26th of July* 1884 *for* $2,500. *No.* 2647834 *by Antonio J. Amadeo to Richard Smith Mason and William Herbert Edward of* 65 *Lincolns Inn Fields, London.*

29 *Sept.* 1888. *Notice by C. Fantauzzi of Morsiglia of the firm of Fantauzzi Huss & Co. that they were effecting an embargo on the insurance moneys and requesting that the amount of the embargo might be retained.*

29 *Sept.* 1888. *Letter from Antonio J. Amadeo to Messrs. Dawes & Sons that no one had the power to represent him or settle with the companies and that according to the Spanish laws he was the only one to settle with the insurance companies.*

29 *Aug.* 1889. *Letter from Mr. Ludwig Duplace that he had been served with a notice of embargo on account of the bank Sociedad Anónima de Crédito Mercantil affecting policy* 2647851 *in my company.*

22 *May* 1891. *Notice of sale by auction of the last mentioned policy.*

10 *Sept.* 1891. *Letter from Antonio J. Amadeo to Messrs. Dawes & Sons that the policies were not endorsed by him and that no one but him had the power to settle with the insurance companies.*

11 *Sept.* 1891. *Letter from Mr. Ludwig Duplace to Mr. Thomas Watlington informing him that he had just heard that the bank at San Juan had become the holder of the Royal and Northern policies the sale of which had been announced.*

18 *Sept.* 1891. *Letter from Ludwig Duplace to the Northern*
95 *Assurance Company to the same effect and that the policy or policies in the Royal and Northern Assurance Companies on which the Caja de Ahorros Savings Bank of Ponce held a lien had been transferred to the bank at San Juan.*

21 *Oct.* 1893. *Letter from Messrs. Fred Huth & Co. of* 12 *Tokenhouse Yard London that Mr. G. Cabrera represented the house of P. Salazar of Porto Rico and was interested in three or four policies taken out in the name of Amadeos.*

27 *Jan.* 1897. *Notice from Mr. Gus Cabrera of* 5 *Laurence Pourtrey Hill London that he was holder for Messrs. Salazar of Porto Rico of certain policies of insurance issued in favor of Mr. Amadeo.*

19 *Feb.* 1901. *Notice by Robert A. Miller of Ponce Porto Rico that he had been appointed to collect all moneys belonging to the Caja de Ahorros.*

6 *May,* 1901. *Notice from Antonio J. Amadeo not to pay any of the policies and that he had commenced suit before the Federal court of the United States in the island of Porto Rico.*

The originals of these notices have been sent by the company to Messrs. Dexter & Hord and are I believe in their possession.)

Interrogatory No. 26. State any other facts or circumstances connected with or necessary to explain any of the previous interrogatories which the defendant company may desire to set forth as material to the issues herein.

Answer to interrogatory No. 26. There are not I think any such other facts or circumstances as are referred to in this interrogatory.

(Sig.) H. S. ARDRAN.

(Sig.) H. C. BISHOP, *Commiss'r.*

96 I, Henry George Bishop notary public duly admitted and sworn residing and practising in the city of London Kingdom of England a commissioner duly appointed to take the deposition of the said Herbert Stanley Ardran a witness whose name is subscribed to the foregoing deposition do hereby certify and attest that before beginning the examination of witnesses I took and subscribed an oath in due form before Mr. Joshua Dawson Watts notary public of this city faithfully to comply with the commission before mentioned. That previous to the commencement of the examination of the said Herbert Stanley Adran as a witness in the cause of Robert Miller, special master, plaintiff, against Royal Insurance Company, defendant, now pending undetermined in the district court of the United States of America for Porto Rico sitting at Ponce, he was duly sworn by me as such commissioner to testify to the truth in relation to the matters in controversy between the said Robert Miller, plaintiff and Royal Insurance Company, defendant, so far as he should be interrogated concerning the same. That the said deposition was taken at my house No. 5 Nicholas lane in the city of London aforesaid on Tuesday the thirtieth day of December A. D. 1902 and that the said deposition was taken by me as aforesaid, the interrogatories and answers thereto as written down were read over to said witness and that thereupon the same were signed and sworn to by the said Herbert Stanley Andran before me, the oath being administered by me as such commissioner at the place on the day and year last aforesaid. That I have subscribed my name to the preceding ten half sheets thereof. That my faculty to practice as a notary is for life.

In testimonium veritatis.

[SEALS.] (Sig.) H. G. BISHOP,
Notary Public, Commissioner.

Consul-general of the United States of America for Great Britain & Ireland.

I, Henry Clay Evans consul general of the United States of America at London, England do hereby make known and certify to all whom it may concern that Henry George Bishop who hath signed the annexed certificate, is a notary public duly admitted and sworn and practicing in the city of London aforesaid and that to all acts

by him so done full faith and credit are and ought to be given in judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed my seal of office at London aforesaid this 30th day of December in the year of our Lord one thousand nine hundred and two.

[SEAL.] H. CLAY EVANS,
Consul General."

97 Whereupon, the defendant, by its attorneys, objected to the action of the court in striking out parts of said deposition, for the reason that no exceptions to such depositions had been filed by the plaintiffs, and because the parts of said deposition so stricken out were material, relevant and competent testimony on behalf of defendant, which said objection was by the court overruled, whereupon defendant did then and there enter its exception.

Defendant then offered in evidence, without objection from plaintiffs, copies of seven policies of insurance, as follows:

One policy of the Northern Assurance Company for five thousand pounds sterling, issued May 19, 1884 to Antonio José Amadeo, upon the sugar establishment at "Quebrada Arenas," including the machinery and rum distillery.

The policy sued on in this case, issued by the Royal Insurance Company, for sixteen hundred pounds, dated September 15, 1884, upon the stock of sugar and molasses in the warehouse of said Antonio José Amadeo at "Quebrada Arenas."

A policy of the Northern Assurance Company, issued to Don Antonio José Amadeo December 21, 1884, for thirty-four hundred dollars, on the bagasse ranchos and cooper shops of the said Antonio José Amadeo on the estate "Quebrada Arenas."

98 A policy of the Northern Assurance Company issued to Don Antonio José Amadeo on December 21, 1884, for twenty-five hundred dollars, on the cooperage establishments, stock of cooperage and building used for storing in the said estate "Quebrada Arenas."

A policy issued to Don Antonio José Amadeo by the Royal Insurance Company on September 15, 1884 for thirty-five hundred dollars, on the rum distillery, machinery and apparatus of the said Amadeo in the estate "Quebrada Arenas" aforesaid.

A policy for five hundred pounds issued by the Royal Insurance Company to Federico Amadeo on February 29, 1884 for a stock of goods in the store of the said Federico Amadeo, a brother of Antonio José Amadeo, in said estate "Quebrada Arenas."

A policy issued July 26, 1884 to Federico Amadeo, brother of Antonio José Amadeo, by the Royal Insurance Company for sixty-five hundred dollars on two buildings of the said Federico Amadeo in the estate "Quebrada Arenas," aforesaid.

Defendant then offered THOMAS WATLINGTON as a witness in its behalf, who gave evidence tending to prove that he is a resident of New Jersey, U. S. A., that his occupation is that of an adjuster of losses. About the year 1885 he had occasion to visit Porto Rico for

the purpose of ascertaining and adjusting the loss under
99 policies issued to Antonio José Amadeo and Federico Amadeo
by the Royal Insurance Company and the Northern Assurance
Company. He went to Porto Rico at that time as a special agent in that case only; that he examined the losses under the policies sued on of defendant company issued to Antonio José Amadeo upon a stock of sugar and molasses in a building composing a part of the sugar plantation at Maunabo.

He arrived at Maunabo on Sunday, April 12th, 1885; he saw Don Antonio José Amadeo, the owner of the plantation at that time, and made a demand upon him in behalf of defendant company for proofs of loss with reference to the amount of sugar and molasses claimed to have been lost or destroyed under the policy sued on; Señor Amadeo refused to furnish these proofs. He had at the time a copy of the original claim made by Antonio Amadeo and furnished by him (Amadeo) to the general agents of the company at San Juan; he did not know if the original was in existence; but the copy which he had was a copy of the claim which Feddersen & Company gave him as having received from Don Antonio Amadeo. Witness showed the copy of this claim to Don Antonio Amadeo and the latter refused to give witness the evidence he asked for in order to verify the claim. Don Antonio Amadeo refused to give witness any information as to the value of the sugar and molasses. The only thing that witness had before him at the time was the copy of the aforesaid claim made on the general agents and in which Don Antonio Amadeo stated that he claimed the value of the produce in the sugar house was sixteen hundred and eighty pounds. This copy of the claim of Don Antonio Amadeo was given to him by Mr. Duplace, the resident member of the firm of Feddersen & Company. Witness called Don Antonio Amadeo's attention to this copy, which witness, at the time of his testimony, produced and had in his
hands; and witness stated that he told Don Antonio Amadeo
100 that there was absolutely no evidence to show for the claim
of sixteen hundred and eighty pounds, and that witness wanted evidence—something to enable him to judge what that stock was.

Witness stated that Don Antonio Amadeo did not file within fifteen days after the fire as particular an account as reasonably practicable of the several articles damaged by fire, nor of the estimated cash value of said articles respectively, having regard to the several values at the time of the fire, nor containing the nature and amount of the loss or damage occasioned to the same.

Witness stated that at that time he told Don Antonio Amadeo that the claim filed by him for sixteen hundred and eighty pounds was simply a claim in English money for a certain amount of stock on hand, and the amount of stock was not shown at all; and witness told him at the time that the claim was rejected and that he must furnish evidence of the stock itself; witness stated to Amadeo that he wanted to know how he arrived at the value of the stock;

Amadeo declined to tell him; witness told Amadeo that the latter must provide the proofs required by the policy.

So far as the knowledge of the witness is concerned Don Antonio Amadeo never furnished any proofs of loss to the company.

Witness left Maunabo, the home of Don Antonio Amadeo, on April 16, 1885, and at that time witness told him all his claims were rejected and that none had been properly made. After that he returned to New York and terminated his services in the matter for the defendant company.

Witness testified that he was employed for the special service for the time being to investigate the loss in question and to report to the company. He told Don Antonio Amadeo that he came to Porto Rico representing the two companies for the purpose of ascertaining the circumstances connected with his losses and making a proper adjustment of them.

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At that time Feddersen & Company were the general agents of the company in Porto Rico and they remained there as such for several years thereafter.

The following testimony was given by the witness:

Q. Do you recollect seeing Dr. Amadeo in New York in the year 1887 in the office of a Mr. Beste?

A. I do.

Q. Please state to the court and jury what happened?

A. Dr. Amadeo called upon me with Mr. Beste in New York and appointed a day for an interview in Mr. Beste's office; I told him that I would go down there and meet him; he had a lot of papers he said he wanted to show me. I kept the appointment and met Dr. Amadeo and Mr. Beste in the latter's office, and Mr. Beste attempted to translate these papers verbally, they being in Spanish, so that I could understand them.

Q. At that time were you an employé or representative or agent of the Royal Insurance Company?

A. No, sir.

Q. In what capacity were you there?

A. It may be said that I was there in an advisory capacity.

Q. At whose request and for whose benefit?

A. For the benefit of all parties so far as that goes.

Q. Please state what happened?

A. Mr. Beste attempted to translate these papers, and I told him, after going over them (I think I had two interviews with them on two separate days) that there was not much use of my going over those papers with him any more because I could not understand them, and that they would have to be translated more carefully and presented so that I could understand them; and I told both of them that I would suggest, to save further trouble, I would suggest to the companies that they settle the losses at twenty-five thousand dollars.

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Q. Did you have any authority at that time to act for the Royal Insurance Company?

A. I did not. That twenty-five thousand dollars was to include all policies of both companies to both the insured, and to cover the entire transaction.

Q. How did you come to make such a suggestion as that?

A. It was made of my own volition. I told Dr. Amadeo that I was not authorized to represent the companies, but that I would do all I could to bring about a settlement.

Cross-examination:

Q. You say that after you left Porto Rico you had no more connection with these companies?

A. No, I did not say that; I have some connection with them now.

Q. After that had you severed your connection with these companies so far as this case was concerned?

A. I said that my authority had ceased. Feddersen & Company kept up a correspondence with me; I had no authority in the matter but at the same time I was quite willing to give any information that I had to either party.

Q. You mean to state that you had no authority to bind the company but that you still continued in the employ of the company so far as binding the insured was concerned?

A. No sir, no such thing,—I bound nobody.

Q. For what purpose did they have correspondence with you so far as these risks were concerned, after you left for New York?

A. It was for the purpose of satisfying Feddersen & Company so that they would not feel any anxiety in the matter. They wrote to me and I replied to their letters.

103 Q. For how long was this correspondence going on?

A. I cannot say, but not very long.

Q. As a matter of fact, how long?

A. The correspondence was very limited.

Q. For about a month or so after your return?

A. It may have been a year or two.

Q. You still kept up a correspondence about this matter?

A. To a limited extent, yes.

Q. Was there an understanding that you should have nothing more to do with this matter—I mean between you and the company?

A. There was nothing binding on the companies; both companies had to be consulted and their consent obtained before anything would be binding on them.

Q. It was an official correspondence?

A. I do not know what you mean by official.

Q. It was of a private nature?

A. It was of a business nature.

Q. Please explain to what extent?

A. That is hard to say.

Q. Could you still have adjusted the claim?

A. No, I could not; I could have adjusted it if the company had affirmed what I did, but it required their affirmation.

Q. Besides being the adjuster were you the agent of the company at the time for Porto Rico?

A. Of course I was not the agent.

Q. If you were not the agent you were not the man to receive any more proofs?

A. Of course not.

Thereupon, defendant offered in evidence, without objection, a certified copy of the judicial proceedings showing the award
104 of the policy in question, and the proceeds payable thereunder by order of court, February 16, 1885, to the Crédito Mercantil, a banking institution at San Juan, Porto Rico.

Defendant further offered in evidence the record in the case of Castaigne, *et al. v.* Moringlan, *et al.*, and the case of Robert Miller, special master, *v.* Antonio José Amadeo, which tend to prove that the mortgage executed by the said Antonio José Amadeo to the Caja de Ahorros has not yet been foreclosed and no efforts made by the said Caja de Ahorros or plaintiff Miller, special master thereof, to exhaust the remedies he may have under said mortgage.

Thereupon defendant offered as a witness in its behalf WESTREMUNDO ORTIZ, who gave evidence tending to prove that a short time before the fire he heard Don Antonio Amadeo offering a certain sum of money and a parcel of land to one Pedro Camacho if he would set fire to the estate "Quebrada Arenas"—the property of the said Amadeo.

VICTORIANO AMARO, offered as a witness in behalf of defendant, gave evidence tending to prove that he knew Federico Amadeo, the brother of Antonio Amadeo, owner of the estate "Quebrada Arenas;" that Federico Amadeo was the mayor domo or man in charge of the place at the time of the fire. Witness was working upon the estate "Quebrada Arenas" about the time of the fire; on the night of the fire he saw Federico Amadeo and another person whom
105 he did not recognize, set fire to the place.

CELESTINO COLON, offered as a witness in behalf of defendant, gave evidence tending to prove that at the time of the fire in question he was a tenant of the Amadeos, living on a piece of property about a quarter of an hour's walk from the estate "Quebrada Arenas." He knew both Federico Amadeo and Antonio José Amadeo for a long time before the fire. Witness stated that on the day of the fire Federico Amadeo told him that if a boy or peon passed by at full speed that he (witness) should tell him not to go to fetch him, as he (Federico) had gone to Caguas. Witness saw the fire and went to inform Federico Amadeo between eleven and twelve o'clock; witness found Federico Amadeo at the house of a concubine a short distance from the "Quebrada Arenas." When witness told Federico

that the sugar estate was burning the latter replied: "Is it true? You don't mean it! Well, if it burns down there will be less work." About an hour and a half after witness had told Federico of the fire witness saw him going towards the hacienda. The night before the fire witness met the night watchman who had been employed upon the estate, and upon witness asking him if he was the watchman now received the reply: No, that he had been dismissed.

At the time of the fire there was about two hundred dollars' worth of stock in the store of Federico Amadeo on the place.

Defendant offered as a witness in its behalf FRANCISCO ORTIZ, who gave evidence tending to prove that one or two days be-
106 fore the fire Federico Amadeo offered him a certain sum if he would go and help set fire to the estate "Quebrada Arenas."

Defendant then offered JUAN LEBRON, as a witness in its behalf, who gave evidence tending to prove that he visited the hacienda the day before the fire and found a great amount of bagasse and straw piled up in the center or plaza of the estate, and that this was very unusual and suspicious.

Defendant thereupon offered in its behalf the witness MIGUEL ARZUAGA, who testified as follows:

Q. Have Sobrinos de Ezquiaga & Company any connection with the Royal Insurance Company?

A. Since May 1889 we have been the general agents of the company in San Juan, Porto Rico, for the whole island.

Q. Whom did your firm succeed?

A. Feddersen & Company who were the agents up to 1889.

Q. And Sobrinos de Ezquiaga have been agents ever since?

A. Yes; the firm of Feddersen & Company were in liquidation and they transferrred the agency to us.

Q. Who were the general agents of the Royal Insurance Company in 1884?

A. Feddersen & Company.

Q. And how long did they continue to be such agents?

A. Up to 1889.

Q. And Sobirnos de Ezquiaga succeeded them?

A. Yes, and have been the agents ever since.

Q. During the time that Feddersen & Company were general agents for the Royal Insurance Company did they or not have any local agents in Porto Rico?

107 A. They were the general agents in San Juan and they had sub-agents at different points on the island. Feddersen & Company were the successors of Feddersen, Willinck & Company; Feddersen & Company succeeded them in 1882 and continued the business to May 1889, when Sobrinos de Ezquiaga took it; Feddersen & Company had the agency of the defendant company from 1882 to 1889; the defendant company has been continuously represented in Porto Rico since the time of the fire.

No evidence was offered by either party proving or tending to prove any transfer of the policy sued on or the proceeds thereunder by or from the Crédito Mercantil to either of the plaintiffs in this case; nor did plaintiff offer any evidence proving or tending to prove that a suit had been brought upon the policy herein within fifteen years after the fire occurred, or that the company or any agent thereof duly authorized had acknowledged the claim of loss under said policy, in writing, within such period of fifteen years.

Both parties having closed their respective cases, the defendant thereupon, by its attorneys, made the following motion in open court:

The defendant moves the court to direct a verdict in this case in favor of the defendant, for the following reasons, to wit:

(1.) This alleged cause of action is, under the pleadings and proofs, prescribed by limitation.

(2.) Because the plaintiff Miller has no right to recover herein.

(3.) Because the plaintiff Lucas Amadeo has no right to recover herein, and has been improperly joined as a party plaintiff.

108 Thereupon, the court overruled said motion, to which ruling the defendant, by its attorneys, noted an exception.

Thereupon, the following agreement was by the parties hereto in open court entered of record:

The defendant having heretofore offered in evidence the record in the suit in equity in this court, No. 91, being the suit of Robert Miller, special master, *v.* Antonio José Amadeo, for the foreclosure of the mortgage executed by the said Amadeo in favor of the Caja de Ahorros, the plaintiffs admit that this mortgage has not been enforced as against the property mortgaged by Don Antonio José Amadeo to the Caja de Ahorros, and the land so mortgaged has not been sold for the purpose of realizing said debt and exhausting the remedy under said mortgage.

Whereupon, the defendant presented to the court the following instructions, which it asked the court to give to the jury in its behalf:

Instruction No. 1 *Asked by Defendant.*

The court instructs the jury that if they believe from the evidence that at the time that Antonio J. Amadeo had the conversation with the witness Watlington in the office of Henry Beste in New York said witness was not an agent of or employed by the defendant company, then nothing that he may have said or done at that time could bind the defendant company.

Which instruction was by the court refused, and to which action defendant then and there noted an exception.

109 *Instruction No.* 2 *Asked by Defendant.*

The court instructs the jury that unless you believe from the testimony that a suit has been brought against defendant company to

recover on the policy herein within fifteen years after the fire occurred, or unless defendant company by an agent duly authorized acknowledged the claim in writing within such period of fifteen years, plaintiff cannot recover herein.

Which instruction was by the court refused, and to which action defendant then and there noted an exception.

Instruction No. 3 Asked by Defendant.

The court instructs the jury that unless a demand was made by Antonio Amadeo, or some one for him, upon the defendant company or upon some agent having authority to represent it, in the presence of witnesses called for that purpose, within fifteen years prior to the bringing of this suit on April 23rd, 1902, plaintiff cannot recover.

Which instruction was by the court refused, and to which action defendant then and there noted an exception.

Instruction No. 5 Asked by Defendant.

The court instructs the jury that neither the Caja de Ahorros nor Robert Miller, special master, has any right to recover against defendant on account of any policy of insurance upon personal property, and if you believe that the property insured under the policy sued on was sugar and molasses, you must find for defendant.

110 Which instruction was by the court refused, and to which action defendant then and there noted an exception.

Thereupon the court, voluntarily, of its own motion, instructed the jury as follows:

GENTLEMEN OF THE JURY: You are entitled to the thanks of all who have had any connection with this case for the careful attention you have given it. It now becomes my duty to tell you what I think of the law in the case, and which you are required by law to accept as the law of the case, you being the judges of the evidence and what has been proved. The court determines the law and you determine the evidence.

You act in this case, not by what may have been proved in some other case or upon some other occasion, but according to the testimony of this case.

This is an action upon a policy of insurance issued on September 15th, 1884, to Antonio José Amadeo, insuring a certain stock of sugar and molasses in the sugar manufactory of an estate known as "Quebrada Arenas" situated in the district of Maunabo, Porto Rico, in the sum of £1600 or about $3,000., for the period of time from November 19th, 1884, to November 19th, 1885. The testi-

mony tends to show that by a fire which occurred on the night of February 6th, 1885, at least some of that stock of sugar and molasses—and you are the judge of how much of it, and the value of it—at least some of that stock was destroyed by the fire.

111 The defences presented are (1) that there was a failure to furnish proofs of loss according to the terms and conditions of the policy; (2) that this action, which was brought on April 23rd, 1902, is barred by limitation and the lapse of time. (3) that the insured caused, or procured or instigated the loss himself, and therefore there can be no recovery.

The sixth clause in this policy of insurance reads thus:

"On the happening of any loss or damage by fire to any of the property hereby insured, the insured must forthwith give notice in writing thereof to the company"—

It is an admitted fact in this case that that was done.

"—And within fifteen days at latest deliver to the company as particular an account as may be reasonably practicable of the several articles or matters insured by this policy, with the estimated value of each of them respectively, having regard to their several values at the time of the fire; and also of the nature and amount of the loss or damage occasioned to each or any such articles or matters, and of the interest of the insured therein; and in support thereof give all such vouchers, proofs and explanations, and other evidence as may be reasonably required by or on behalf of the company, together with, if required, a statutory declaration of the truth of the account; and, in default thereof, no claim in respect of such loss or damage shall be payable and sustainable unless and until such notice, account, proof and explanations or evidence respectively shall have been given and produced as aforesaid, and such statutory declaration, if required, shall have been made."

112 An insurance company has the right to provide in its policies of insurance that a statement of proofs of loss shall be presented to it within a certain time, and if that time be a reasonable time, then that is a valid condition of the policy, and until the insured presents that statement of proof, such as may be reasonable, he cannot, by law, enforce the payment of his claim. Many reasons will readily occur to you why the law permits that. Witnesses may die or may move away. It is very important to the insurance company that it should know of the loss that it may have time, if it desires, to send a man to the locality to investigate it. The insured is in charge of the property; the company is not present; the insured has control of the property, and therefore it is very proper, if there be a loss, that the insured shall at once notify the insurance company that the loss has occurred, and it is very proper that within a certain time, which the parties may fix by their contract, he shall present a statement of that loss, in order that the company may either pay it or investigate it by sending their agent to look into it.

The provision in this policy was that a statement of the loss was to be furnished within fifteen days. I think under all the circum-

stances, that this was a reasonable condition, and that the parties had a right to make that a part of the contract. There is testimony tending to show that after the company—and when I say "company" I mean the general agents of the company, because an insurance company is an ideal being and it must necessarily act through agents; that is the only way it can act—there is
113 testimony tending to show that after the company received notice of this fire it notified the insured, Dr. Amadeo, that it would send its agents to look into the matter. There is testimony tending to show—(and that is for you to determine whether it was done or not)—that they did so; that they sent one man or more,—two men it is claimed in this case—that they at least sent a party or agent to look into this matter, and there is testimony tending to show that the insured, Amadeo, in connection with that party who claimed to be acting for the company, made out a statement of this loss, and that that was furnished to the party that was there acting for the company, and that was sent to the general agents, and there is testimony tending to show that the proofs of that loss were furnished to the general agents by the insured.

There is also testimony tending to show that something over three months after that fire occurred, or about three months or a little over, after these proofs of loss had been furnished, that an agent selected by the company to adjust this loss came to Porto Rico on behalf of this company. There is nothing showing in this case that his power as to the adjustment of this loss was restricted in any way on the part of the company, or that the insured had any knowledge it was restricted. At that time, after an investigation, this adjuster notified the insured that the proofs of loss were not sufficient.

114 If a person representing the company had been sent there to examine into that matter, and had done so, and in connection with the insured had prepared a statement of that loss, and it had been furnished to the company, then that was all the insured was required to do. In other words, if an agent representing the company had acted in connection with the insured and had prepared a statement of the loss, and it had been furnished to the company, then if the company within a reasonable time after it could have examined that proof of loss did not make any objection to that proof of loss and inform the insured of it, then that was a waiver, in law, of objection to that proof of loss. Objections three months or more after the time the agent who was sent there to adjust that loss reported to the company, was not an objection within a reasonable time, especially if it be true that someone representing the company and the insured had in conjunction made out a proof of loss. If proofs of loss had been furnished to the company within fifteen days from the time of the loss, then that was a compliance with the conditions of the policy. Policies sometimes provide that actions must be brought within a certain specified time after the loss for the collection of the insurance. The courts and the law uphold that kind of a condition because it is reasonable, but there is no condition of that

kind in this policy. There is no condition in this policy requiring that an action shall be brought within a specified time after the loss or after the rejection of the claim. It is left to the general statute of limitations upon that subject, prescribed by the law-makers
115 of the land. They have seen fit to prescribe certain limitations of time within which actions shall be brought, and this is done for the repose of society and business.

As I have already stated to you, this suit was brought on April 23rd, 1902, and the fire occurred on February 6th, 1885. By the terms of this policy, and as a matter of law, this loss was payable within a reasonable time after this company had received the proofs of loss and had had time to examine them, and see what the loss was.

There is testimony tending to show that the proofs of loss were furnished within fifteen days after February 6th, 1885.

The insurance company is, in law, entitled to a reasonable time within which to examine that statement of loss and see whether it will make any objections to it, and if it makes no objections to it within a reasonable time, then that loss, whatever it may be, becomes due from that period. The limitation as to this character of an action was fifteen years from the time that loss became due. Originally there was no such thing as limitations to actions. A man, originally, could sue within a hundred years from the time the right of action accrued, but the law-makers in their wisdom saw fit, as to all actions, to prescribe periods of time within which they could be brought, and an action of this character had to be brought, according to the statute of limitations in force at that time, within fifteen years from the time the loss became due, or else the party was
116 not entitled to maintain it. There could be a suspension of that statute of limitations. In other words, there could be a chopping off or cutting down of the time that barred the action by the conduct of the parties.

There is testimony tending to show that in May 1887 the insured, Antonio Amadeo, went to New York; that he there found the agent who had been sent to Porto Rico in 1885 to adjust this loss. There is testimony tending to show that he then demanded a settlement of that loss. There is testimony tending to show that at that time that agent who had come here to Porto Rico as an adjuster of that loss offered him in settlement of this policy and other policies upon that property the sum of twenty-five thousand dollars. Upon the other hand, it is said that there was not such an offer; that the party merely said to the insured, "I will use my good offices in trying to get a settlement for twenty-five thousand dollars," and it is stated that there was no offer of a certain sum in settlement of that loss. It is for you to determine, from all the evidence in the case, what actually occurred.

I say to you, as a matter of law, that if the company sent a man to Porto Rico in 1885 to settle this loss, with general power to adjust and settle it, although his power only applied to this loss, that then; unless the insured, Antonio Amadeo, had notice that his agency as

to that loss had ceased, or that it had been restricted in some way, or had ended, he had the right in law, and the company, as a matter of law, were still holding him out to the insured as the
117 adjuster to settle that loss,—the insured had a right, in law, to apply to that adjuster and demand of him a settlement of that loss. If it be true, as is contended by the one side, that at that time that party made an offer absolutely and unconditionally of so much in settlement of this and other policies, that would cut off for the time and stop the running of the statute of limitations, and his action, if the company had given no notice to the insured that the adjuster's agency had ended, cut off the running of the statute of limitations, and you will readily see that from May, 1887, until the time this action was brought is not a period of fifteen years, and therefore the limitation will not apply.

Upon the other hand, if you believe from the testimony that the insured was either notified at that time that that party who had been the adjuster was no longer the adjuster and had no power to act, then that offer was not binding on the company; or, if you believe from the testimony that the offer of so much in settlement was not made at that time, and that it was only an offer on the part of the party to do what he could to bring about a settlement, he merely acted as a friend or intermediary, then it would have no operation in suspension of the statute.

Further than that, the testimony tends to show that in August, 1898, a gentleman by the name of Battistini went to Liverpool and demanded payment of this company in settlement of the policy, he acting at that time, as the testimony tends to show, upon the
118 part of the insured; that he then had the policy with him and was acting also for Lucas Amadeo, who had become interested in the collection of this insurance; that he saw the secretary of the company and that the secretary did not pay the policy or want to have anything to do with it. If you believe from the testimony that this party, Battistini, acting for the insured and for Lucas Amadeo, went to Liverpool and demanded payment of this claim, and there was an offer to pay, or an agreement to pay a certain sum on it, then that would also stop the running of the statute of limitations and would cut off the time. Even if there had existed no such state of case as I have named to you between the agent of the company who came to Porto Rico to adjust this loss and Amadeo in the month of May 1887 in New York, even if that had not occurred, then this would stop the running of the statute of limitations, if there was not only a demand of payment but an offer of payment.

If you believe, therefore, that from the time this loss became due, as I have indicated to you, until this action was brought, a period elapsed of more than fifteen years, but that there had been a waiver or waivers of the statute of limitations, as I have indicated to you might be done, then this action is maintainable; if, upon the other hand, there had been no waiver in any way of the statute of limitations, and if more than fifteen years had elapsed from the time the

loss occurred to the bringing of this suit, then it is barred by the statute.

119 There is another condition in this policy—number 7—which reads as follows:

"No profit nor advantage of any kind is to be included in any claim for loss or damage under this policy, and if the claim be in any respect fraudulent, or if any false statutory declaration be made or used in support thereof, or if the fire be occasioned by or through the procurement or with the knowledge or connivance of the insured, all benefit under this policy is forfeited."

I have already stated to you that it is claimed in the case that this loss was instigated, or procured or brought about by the insured. I need not say to you that if that be the case, if you believe that from the testimony, the insured ought not to recover, and no one claiming under him ought to recover. It would be an outrage upon the law, and upon business if a man could insure his property and then set fire to it and recover for it, or if he could procure another man to commit a crime for which he ought to be in the penitentiary, and then recover from the insurance company. Upon the other hand, while this case involves a certain amount of money, it incidentally affects character, of which it has been stated that a man without it is as moulded brick or painted clay. It is a matter of importance and a matter to which I know you will give full and careful attention. If you believe from the testimony that the insured procured this property to be destroyed by fire, if he instigated that crime, or in other words, if he brought it about in any way—and you understand what that means—why then he cannot recover.

120 The testimony relative to this is quite conflicting. It is often the case in such cases. You are the judges of the credibility of the witnesses, of the weight to be given to the testimony, and of all the circumstances proved in the case. You do not determine the case from the testimony of one witness alone—unless you believe his testimony outweighs all the balance—you consider all the testimony in the case, and from that you are to make up your minds as to whether the insured in this case instigated or procured the destruction of this property.

You judge of the credibility of the witnesses to some extent by their intelligence. You regard what interest they may have in the case. For instance, the insured may be interested; or another man may be interested in preserving his character; or another man may have been procured to testify to certain things, and another man may be unfriendly with one party or the other. You judge of all that in making up your opinion as to the credibility to be given to the testimony of the witnesses and the weight to be given it, and from all that testimony, and the situation of the parties and the situation of the witnesses you judge of whether a certain fact has been proved or not.

If you find for the plaintiffs in this case, you find the value of the actual loss that occurred to the property that was destroyed at

that time by that fire. Insurance is not for the purpose of a man making money out of it. This condition of the policy that I read to you provides as to that, and that is the common sense of
121 the matter. The object of insurance is to indemnify a man for losses he has sustained and to make him whole again. A man pays a certain premium to an insurance company and the company, in consideration of that premium, indemnifies him against loss by fire, or whatever other damage may be specified, for a certain period of time. You have to determine from the testimony, if you find for the plaintiff, what amount of property was on hand at the time of this fire, and its value. You fix that; the court has no right to fix it. I could detail to you what I recollect was the property and the value of it, but I might be mistaken in my recollection of the testimony, and if I were mistaken it would be your duty in the jury room to correct me by your verdict.

If you find for the plaintiff, you may or may not—that is a matter in your discretion—allow interest upon the amount which you may find from the time when it became due, as I have indicated, to the present time, and then add that amount of interest to the amount of the loss, and your verdict would be in that event, "We, the jury, find for the plaintiff" so much in damages—the total amount, whatever it may be. If, upon the other hand, if you find for the defendant you simply say, "We the jury, find for the defendant," and one of you sign the verdict as foreman—any one of you.

I say further to you, so far as the limitations are concerned, that if there was at any time a period within which the insurance company had no agent in the island of Porto Rico, that then that
122 period would not be counted as a part of the limitations period.

Gentlemen, I think you recollect the testimony in the case, and from what I have said you understand the law of the case which is to be applied to the facts, and I think I have nothing further to say.

(To the attorneys:) Gentlemen, do you wish anything further in the case?

Mr. BOERMAN, attorney for plaintiffs: We would like to except to that part of the charge of the court about the period of limitations being fifteen years, as this action accrued before the enactment of the code.

The COURT: Well, save the question.

Mr. BOERMAN: Also to that part of the charge of the court which states that an interruption of the statute of limitations cannot be by demand only, but by an offer from the other side.

The COURT: Save the exception.

Mr. DEXTER (attorney for defendant): We would like to enter a formal exception to the failure or refusal of the court to charge the written instructions asked by the defendant.

The COURT: I will overrule the instructions except as already given in the charge of the court. I have marked them as refused. Instructions 1, 2, 3, and 5 are refused and number 4 is given.

The defendant excepted to that part of the charge of the court as follows:

123 "If a person representing the company had been sent there to examine into that matter, and had done so, and in connection with the insured had prepared a statement of that loss, and it had been furnished to the company, then that was all the insured was required to do. In other words, if an agent representing the company had acted in connection with the insured and had prepared a statement of the loss, and it had been furnished to the company, then if the company within a reasonable time after it could have examined that proof of loss did not make any objection to that proof of loss and inform the insured of it, then that was a waiver, in law, of objection to that proof of loss. Objections three months or more after the time the agent who was sent there to adjust that loss reported to the company, was not an objection within a reasonable time, especially if it be true that someone representing the company and the insured had in conjunction made out a proof of loss."

For the reason that this eliminates the question of the adjuster's authority to make and exact requirements from the insured, and for the further reason that the testimony in this case tended to show that the proofs were presented in March and were objected to in April, which must be regarded as a reasonable time.

To which ruling of the court the defendant then and there excepted.

The defendant further excepted to that part of the court's charge as follows:

"There is testimony tending to show that in May, 1887, the insured, Antonio Amadeo, went to New York; that he there found the agent who had been sent to Porto Rico in 1885 to adjust this loss; there is testimony tending to show that he then de-

124 manded a settlement of that loss. There is testimony tending to show that at that time that agent who had come here to Porto Rico as an adjuster of that loss offered him in settlement of this policy and other policies upon that property the sum of twenty-five thousand dollars."

For the reason that such testimony showed that said adjuster was not an agent of the company at the time the alleged demand was made by Amadeo, and the charge of the court should be qualified with the further statement to the jury that the jury should believe from the evidence that such adjuster at the time of said alleged offer had authority to act for the company,"

Which exception was by the court overruled, with the statement: "This company was a foreign insurance company and the party—the insured, did not know to whom to go.

Mr. DEXTER (for defendant): "We base the exception on the ground that after the loss the insured was bound to take notice with whom he was dealing."

The COURT: "I overrule it."

To the action of the court defendant then and there duly excepted.

The defendant also excepted to that part of the court's charge as follows:

"If the company sent a man to Porto Rico in 1885 to settle this loss, with general power to adjust and settle it, although his
125 power only applied to this loss, that then, unless the insured, Antonio Amadeo, had notice that his agency as to that loss had ceased, or that it had been restricted in some way, or had ended, he had the right in law, and the company, as a matter of law, were still holding him out to the insured as the adjuster to settle that loss,—the insured had a right, in law, to apply to that adjuster and demand of him a settlement of that loss. If it be true, as is contended by the one side, that at that time that party made an offer absolutely and unconditionally of so much in settlement of this and other policies, that would cut off for the time and stop the running of the statute of limitations, and his action, if the company had given no notice to the insured that the adjuster's agency had ended, cut off the running of the statute of limitations, and you will readily see that from May 1887, until the time this action was brought is not a period of fifteen years, and therefore the limitation will not apply."

For the reasons given in the last exception just taken, and for the further reason that such an admission, even if made, would not be sufficient unless made in writing by a person duly authorized to bind the defendant company; and further, because there is no evidence tending to show that witness was the representative and agent of the company at the time or had authority to so bind it; because the testimony offered in this trial of the said Watlington is incompetent and immaterial for the purpose of proving his own authority; and for the further reason that if any such conversation was
126 had with, or statements made by, him, the same were only made in a friendly way for the purpose of endeavoring to bring about a compromise or settlement of the claim now sued upon.

Which exception the court overruled, and thereupon defendant then and there saved the question.

Defendant further excepted to that part of the charge of the court as follows:

"The testimony tends to show that in August, 1898, a gentleman by the name of Battistini went to Liverpool and demanded payment of this company in settlement of the policy, he acting at that time, as the testimony tends to show, upon the part of the insured; that he then had the policy with him and was acting also for Lucas Amadeo, who had become interested in the collection of this insurance; that he saw the secretary of the company and that the secretary did not pay the policy or want to have anything to do with it. If you believe from the testimony that this party, Battistini, acting for the insured and for Lucas Amadeo, went to Liverpool and demanded payment of this claim, and there was an offer to pay, or an agreement to pay a certain sum on it, then that would also stop

the running of the statute of limitations and would cut off the time. Even if there had existed no such state of case as I have named to you between the agent of the company who came to Porto Rico to adjust this loss and Amadeo in the month of May 1887 in New York—even if that had not occurred, then this would stop the running of the statute of limitations, if there was not only a demand of payment but an offer of payment,"

127 For the reason that there was no testimony proving or tending to prove that any agent of defendant company had offered to pay the policy sued on or any part thereof, and that no acknowledgment of the debt was made by the company or any agent thereof in writing, or suit brought within fifteen years after the loss occurred; and for the further reason that according to the testimony of Battistini he was representing at the time Lucas Amadeo, who, as the evidence in this case shows, had no interest in and to the said policy or the proceeds thereof, at the time.

Which exception was by the court overruled, and the defendant then and there noted an exception.

Defendant excepted also to that part of the court's charge which refers to a simple demand being sufficient.

The COURT: Do you think it has to be in writing?

Mr. DEXTER (for defendants): Yes.

The COURT: Well, I overrule it; save the exception.

To all of which action of the court, defendant did then and there note its exception.

Thereupon the jury retired and returned their verdict, and having returned into court a verdict for plaintiff for the sum of twelve thousand dollars, the defendant afterwards and on the same

128 day, and at the said May term of the court at Ponce as aforesaid, moved the said court to set aside the said verdict and grant it a new trial. The said motion for a new trial being literally copied is as follows:

Now comes the defendant, Royal Insurance Company, by its attorneys, Dexter & Hord and J. M. Keedy, and moves for a new trial herein.

129 Which motion for a new trial was, after argument by counsel, after due consideration by the court, then and there overruled,

And to which action of the court the defendant then and there excepted.

And now, in furtherance of justice and that right may be done, the defendant, The Royal Insurance Company of Liverpool, now tenders and presents the foregoing as its bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this the 14th day of October, 1903, as of the May term 1903 of said court at Ponce aforesaid.

WM. H. HOLT,
Judge of the District Court of the United States for Porto Rico.

130 In the District Court of the United States for Porto Rico, Sitting at Ponce.

ROBERT MILLER, Special Master,
vs.
ROYAL INSURANCE COMPANY.

I, H. H. Scoville, clerk of the district court of the United States for Porto Rico, do hereby certify that the foregoing one hundred and thirty typewritten and printed pages, numbered from one to one hundred and thirty inclusive, are and constitute a true and correct copy of the record and all proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of this court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to the writ of error is $47.23 *dollars*, and that said amount was paid by the attorneys for the plaintiff in error.

In witness whereof I have hereunto set my hand and fixed the seal of said court at San Juan, Porto Rico, this 21st day of October, 1903.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

131 UNITED STATES OF AMERICA

ROBERT A. MILLER, Special Master, ET AL.
versus
ROYAL INSURANCE COMPANY.

Writ of Error.

The President of the United States to Honorable William H. Holt, judge of the district court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said district court of the United States for Porto Rico before you between Robert Miller, special master and Lucas Amadeo, defendants in error, and Royal Insurance Company, plaintiff in error, a manifest error hath happened to the great damage of The Royal Insurance Company, plaintiff in error, as by its complaint appears,

We, being willing that error, if any hath been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that

under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington, U. S. A., at the next term thereof to be then and there held that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this twenty ninth day of May in the year of our Lord one thousand nine hundred and three.

[Seal United States District Court for the District of Porto Rico.]

Attest: RICARDO NADAL, *Clerk*,
By H. H. SCOVILLE, *Deputy*.

Allowed by:

WM. H. HOLT,
Judge District Court of the United States for Porto Rico.

132 [Endorsed:] C. L. No. 113. In the district court of the United States, for Porto Rico, Ponce. May term, 1903 Robert Miller special master *et al. versus* Royal Insurance Company. Writ of error. May 29th.

133 *Return on Service Writ.*

UNITED STATES OF AMERICA, } ss:
The District of Porto Rico, }

I hereby certify and return that I served the annexed citation on the therein-named Robert A. Miller special master and Lucas Amadeo, by handing to and leaving a true and correct copy thereof with Charles M. Boerman attorney of record for plaintiff personally at Ponce in said district on the 11th day of June, A. D. 1903.

E. S. WILSON, *U. S. Marshal*,
By GEO. TRAUTMAN, *Deputy*.

134 In the District Court of the United States for Porto Rico, May Term, 1903.

ROBERT A. MILLER, Special Master, ET AL. *versus* ROYAL INSURANCE COMPANY. } Common Law. 113.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert Miller, special master of the Caja de Ahorros, and Lucas Amadeo, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, D. C. U. S. A. within thirty days from this writ pursuant to a writ of error filed in the clerk's office of the district court of the United States for Porto Rico wherein The Royal Insurance Company is plaintiff in error and you are defendants in error, to show cause, if any there be why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this tenth day of June, A. D. 1903, and of the Independence of the United States the one hundred and twenty seventh.

[Seal United States District Court for the District of Porto Rico.]

WM. H. HOLT,
Judge of the District Court of the United States for Porto Rico.

Attest:
RICARDO NADAL, *Clerk,*
By H. H. SCOVILLE, *Deputy.*

135 [Endorsed:] C. L. No. 113 In the district court of the United States, for Porto Rico, Ponce. —— term, 190– Robert Miller, special master *et al. versus* Royal Insurance Co. Citation Marshal fees: 1 service $2\frac{00}{100}$ 13th Filed clerk's office, United States district court.

Endorsed on cover: File No. 19134. Porto Rico D. C. U. S. Term No. 483. Royal Insurance Company, plaintiff in error, *vs.* Robert Miller, special master of the Caja de Ahorros, and Lucas Amadeo. Filed November 16", 1903. File No. 19134.

FILE COPY.

FILED
OCT 16 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 7.

ROYAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT MILLER, SPECIAL MASTER OF THE CAJA DE AHORROS, AND LUCAS AMADEO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

FRANCIS H. DEXTER,
FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiff in Error.

WAYNE MACVEAGH,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 19410

SUPREME COURT OF THE UNITED STATES.

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ROYAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT MILLER, SPECIAL MASTER OF THE CAJA DE AHORROS, AND LUCAS AMADEO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

Preliminary Statement.

This case comes before this court on a writ of error to the district court of the United States for the district of Porto Rico to review a judgment of that court for the sum of $12,000 and interest, entered on the 22d day of May, A. D. 1903, in favor of the defendants in error, Robert Miller, special master, etc., and Lucas Amadeo, plaintiffs below, against the plaintiff in error, The Royal Insurance Company of Liverpool, the defendant below.

The suit, which was commenced April 23, 1902, is in *assumpsit* and is founded upon a policy of fire insurance issued September 15, 1884, by the Insurance Company to and in favor of one Antonio Amadeo. The policy was for £1,600, or the equivalent of $8,000, currency of the United States, for the term of one year, and insured the owner against loss by fire on a certain "stock of sugar and molasses deposited in the sugar manufactory on the estate 'Quebrada Arenas'" (R., 50.)

The manufactory, with its contents, whatever they then were, was destroyed by fire during the night of the 6–7th of February, A. D. 1885 (R., 6), and "forthwith after the happening of said loss and damage notice thereof was given to the defendant," which "then absolutely refused to consider the claim" (R., 7).

The policy was subject to the following conditions endorsed thereon:

"5. This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person, otherwise than by will or operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by memorandum endorsed hereon by, or on behalf of the company.

"6. On the happening of any loss or damage by fire to any of the property hereby insured, the insured must forthwith give notice in writing thereof to the company, and within fifteen days at latest deliver to the company as particular an account as may be reasonably practicable of the several articles or matters damaged or destroyed by fire, and also of all other articles and matters insured by this policy with the estimated value of each of them respectively, having regard to their several values at the time of the fire; and also of the nature and amount of the loss or damage occasioned to each or any such article of matter, and of the interest of the insured therein; and in support thereof give all such vouchers, proofs and explanations and other evidence as may be reasonably required by or on behalf of the company, together with, if required,

the statutory declaration of the truth of the account; and in default thereof, no claim in respect of such loss or damage shall be payable or sustainable unless or until such notice, accounts, proofs, and explanations or evidence respectively shall have been given and produced as aforesaid, and such statutory declaration, if required, shall have been made."

It appears from the proofs that an adjuster of the defendant company on April 12, 1885, after the fire, saw Antonio Amadeo, the insured, and demanded from him "proofs of loss with reference to the amount of sugar and molasses claimed to have been lost or destroyed," and said Antonio Amadeo "refused to furnish these proofs" (R., 71), and, further, said adjuster showed to said Amadeo a copy of the claim of loss submitted by Amadeo to Feddersen & Co., general agents for the Royal Insurance Company in Porto Rico, and said Amadeo refused to furnish him with the evidence to verify the claim, and refused to give him "any information as to the value of the sugar and molasses;" whereupon the adjuster advised Amadeo that the claim was rejected and claimant was notified that he must provide the proofs required by the policy (R., 71–72).

So far as the record discloses, claimant furnished no further proofs of loss or of the value of the sugar and molasses alleged to have been destroyed, and, though he appears from time to time to have verbally, or otherwise informally, asserted his claim of right to receive the proceeds of the policy, he has never brought any action in any court to enforce such claim, and the insurance company has steadily refused to pay anything on account thereof.

On September 19, 1884, just four days after the date of the policy sued on, said Antonio Amadeo, under the name of Antonio José Amadeo, claiming to be the owner of the sugar plantation "Quebrada Arenas," * * * "all planted in cane with the exception of the lands occupied by the

buildings, yards and lanes," and containing, "in addition, the proper establishments for the manufacture of sugar" (R., 54–55), and admitting himself to be "indebted to the Caja de Ahorros of this city (Ponce) in the sum of $15,036.27, which was advanced to him as a loan to attend to the development and keeping of the aforementioned property," agreed "to secure the aforementioned credit with a first mortgage on the plantation above referred to" (R., 56), and "as a guarantee of this loan" constituted "a voluntary mortgage on the property described and the fruits thereof for the amount of $15,036.27 which he has received; for 1,000 pesos to answer to the interest which in case of delay, might accrue; and for 3,000 more to cover costs in the event of litigation, with which encumbrance the property shall remain until this obligation shall have been completely canceled" (R., 57).

The expressed term of the mortgage was for six months ending March 17, 1885 (R., 57).

When called as a witness on behalf of the plaintiff in this cause, Antonio Amadeo testified that "he had given the policy of insurance in question and herein sued on as collateral security to the Credito Mercantil (a banking establishment), and that he had also mortgaged his property to the Caja de Ahorros, which said mortgage he did not pay" (R., 61).

During the course of the trial it was admitted by the plaintiffs below that the above mortgage had "not been enforced as against the property mortgaged by Don Antonio José Amadeo to the Caja de Ahorros, and that the land so mortgaged has not been sold for the purpose of realizing said debt and exhausting the remedy under said mortgage" (R., 76).

Proof was offered by the defendant company without objection tending to show that by a judicial proceeding, to

which the defendant company was not a party, the policy in question and the proceeds payable thereunder were, by order of the court entered February 16, 1885, awarded "to the Credito Mercantil, a banking institution at San Juan, Porto Rico" (R., 74).

No evidence whatever was produced or offered in the course of the trial tending to prove the assignment or transfer from the Crédito Mercantil of any interest it might have had in the policy itself or its proceeds to either of the plaintiffs in this cause.

It is averred in the declaration that the Caja de Ahorros de la villa de Ponce had been declared a bankrupt by the court of first instance of Ponce, and that trustees had been appointed in said bankruptcy proceedings who had taken charge of the assets of which the said mortgage upon the said property formed a constituent part, and that in a proceeding by certain creditors against said trustees "this plaintiff, Robert A. Miller, has been duly appointed by an order of the 24th of January, 1901, a special master with the power and duty to collect judicially or extrajudicially all the assets of the said Caja de Ahorros de la villa de Ponce, of which assets the sums due by the defendant herein for the insurance of said property form a part" (R., 7). No evidence to sustain such averments was introduced save a certified copy of the appointment of Robert A. Miller as special master, which certified copy (its contents not being set forth in the record) was admitted in evidence over the objection of the defendant's counsel (R., 54).

The questions presented by the record are numerous. Generally speaking, they turn upon the right of either of the plaintiffs to maintain any action whatever against the defendant upon the fire insurance policy in question:

First. Because of want of privity or of any contractual relationship between either of said plaintiffs and the defendant.

Second. Because all action upon said policy was barred prior to the institution of this suit by the statutes of limitations long in force in Porto Rico.

The Pleadings.

The pleadings are complicated by various amendments, and in connection with the rulings of court made from time to time upon various motions concerning them present a confusing condition. Stated in their ultimate form, as amended, they exhibit the following case and issues:

The declaration which was filed April 23, 1902, by Robert A. Miller *alone*, as special master of the Caja de Ahorros de la villa de Ponce, against "the Royal Insurance Company of Liverpool, a foreign corporation organized under the laws of England and doing business in Porto Rico," avers that on or about the 15th of September, 1884, the defendant insurance company in Porto Rico made a policy of insurance for £1,600 (R., 1) in favor of Antonio Amadeo "on a stock of sugar and molasses deposited in the sugar factory on the estate of *one* Quebrada Arenas, jurisdiction of Maunabo, Porto Rico" (R., 28), and delivered the same to Antonio Amedeo, of Quebrada Arenas, Maunabo, Porto Rico, thereby promising said Antonio Amadeo, in the terms of said policy and upon the conditions therein set forth, "to pay to him sixteen hundred pounds sterling, a sum of money equivalent to eight thousand dollars, United States currency;"

That at the time of the making of said policy and from then until February 6, 1885, when the loss complained of occurred, said Antonio Amadeo had an interest in the property (R., 6) described as a "stock of sugar and molasses de-

posited in the sugar manufactory on the estate 'Quebrada Arenas'" (R., 50, 59, 60) "to the amount of the sum insured, subject however to a certain deed of mortgage or hypoteca executed by him on or about the nineteenth day of September, 1884, to the Caja de Ahorros de la villa de Ponce, by which deed he mortgaged to the said Caja de Ahorros said property insured, together with the sums insured upon the said property" (R., 6);

That on or about the 6th of February, 1885, while said policy was in full force, the property described therein was consumed by fire, and the loss and damage thereby sustained amounted to the above sum; and forthwith, after the happening of said loss, "notice thereof was given to the defendant," and "the defendant then absolutely refused to consider the claim" (R., 7);

That the sums of money due upon said mortgage have never been paid to the said Caja de Ahorros and are still due; the Caja de Ahorros has been declared a bankrupt by the court of first instance of Ponce; trustees in bankruptcy were appointed, qualified, and took charge of the assets of which the said mortgage upon the said property formed a constituent part, and in a proceeding by Castaing and others, creditors of said Caja de Ahorros, against said trustees, which is "now pending in the United States district court for Porto Rico," Robert A. Miller was "duly appointed by an order of the 24th of January, 1901, a special master, with the power and duty to collect judicially or extrajudicially all the assets of the said Caja de Ahorros de la villa de Ponce, of which assets the sums due by the defendant for the insurance of said property form a part. By certain proceedings to foreclose said mortgage, which proceedings were then pending in said district court, said Antonio Amadeo has been absolutely foreclosed and debarred from all equity of redemption in and to the mortgaged property, and the plaintiff Miller has become invested with all the rights and interest of said Amadeo therein, and is entitled to collect the

sums due by the defendant on the insurance of said property for the benefit of the creditors of the Caja de Ahorros" (R., 7);

That demands have repeatedly been made on the defendant as late as in the year 1897, but that the defendant has not paid; that as to all matters averred upon information and belief he has no personal knowledge, and therefore avers them upon information and belief (R., 13).

To the declaration in this form the defendant company demurred, both generally (R., 10) and specially, upon the grounds:

(1.) Of want of capacity in the plaintiff to sue;

(2.) That the declaration does not state sufficient facts to constitute a cause of action, and

(3.) Because upon the face of the declaration the alleged claim is prescribed by the statutes of limitations (R., 11).

The demurrers having been submitted to the court it was of opinion with respect to the alleged want of capacity in the plaintiff Miller to sue that "power was given him to do so by the order appointing him, and it is immaterial whether he is called a special master or receiver," and with respect to the bar of the statutes of limitations the court ruled that such defense, if relied upon, "must be pleaded." "It is a question of fact if prescription has run against the claim" (R., 12). Both demurrers, so far as the above grounds were concerned, were overruled (R., 12), and the general demurrer having been sustained, in so far as certain matters of form were concerned, such objectionable matters were corrected by amendment (R., 13).

Thereupon the defendant pleaded (1) *non assumpsit*, and (2) that the cause of action did not accrue within fifteen years before said suit was filed (R., 14).

Plaintiff joined issue upon the first plea, and with respect to the second replied upon information and belief that the

defendant, during many years, " was absent beyond the seas and in a foreign country and did not have a residence in the island of Porto Rico, and also that extrajudicial claims have been made on the defendant in the year 1897 " (R., 16).

Afterwards, by leave of court, the defendant filed, among other pleas, not important here, the following additional pleas:

6. That plaintiff ought not to recover herein because no transfer of the policy sued on was made to the plaintiff or to the Caja de Ahorros or to any other person with the consent of the defendant, and no notice of any such transfer has been given to the defendant, and the subsistence of the insurance was not requested in favor of the plaintiff or the said Caja de Ahorros or any other person, as required by the conditions of the policy, and neither the policy nor the loss thereunder was transferred or passed or accrued to said Caja de Ahorros or to the plaintiff either by will or by operation of law (R., 21, 29).

9. That plaintiff ought not to recover herein because neither said Antonio J. Amadeo nor any one else within fifteen days after the happening of the alleged loss or damage delivered to defendant as particular an account as was reasonably practical of the several articles or matters damaged or destroyed by fire with the estimated value of each of them respectively, nor of the nature and amount of the loss or damage occasioned to each or any such article or matter and of the interest of the insured therein, nor did he or they deliver in support of the claim vouchers, proofs, and explanations and other evidence required by or on behalf of defendant, nor the statutory declaration as to the truth of the account (R., 22, 29).

11. That plaintiff ought not to recover herein because the claim made by the insured was false and fraudulent and

"the fire occurred by incendiarism resulting from the negligence and conduct of the insured" (R., 22, 29); that prior to the execution of the mortgage from Antonio Amadeo to the Caja de Ahorros said policy of insurance had been assigned, transferred, pledged, and hypothecated by said Amadeo to the Credito Mercantil, a bank at San Juan, Porto Rico, and at the date of the execution of said mortgage the Credito Mercantil was the owner and holder of said policy, subject to the payment of an indebtedness of a large amount to it by said Amadeo; thereafter said policy, while still in the possession of and subject to the claims and interest of said Credito Mercantil, was duly attached in a suit instituted by it against said Antonio Amadeo in a competent court, wherein judgment was entered by said court against said Antonio Amadeo, and said policy was ordered to be sold to satisfy the same; that thereafter, on the 22d of May, 1890, said policy was sold at public auction, and thereafter, on the 6th of August, 1891, was adjudicated and awarded to said Credito Mercantil; thereafter, on the 17th of September, 1891, in accordance with the law and practice then existing, the judge of said court executed before a notary public a conveyance of said policy and all rights thereunder free and clear of the rights of all other parties whatsoever, and no transfer or assignment of the rights of interest of said Credito Mercantil in and to such policy or the loss thereunder has ever been made to the plaintiff or to said Caja de Ahorros" (R., 25).

All of the above pleas except the last were traversed upon the record (R., 29).

With respect to the last plea, plaintiff replied, admitting so much thereof as averred that there had been no assignment of the rights or interest of the Credito Mercantil therein to plaintiff or the Caja de Ahorros, denied the remainder of the plea, and averred—

"that the insured never assigned said policy but has given it as collateral security on a loan made by him from the Credito Mercantil, a banking institution on behalf of which an order of attachment has been issued by the court of first instance of San Juan, and the policy was then after the loss by fire sold at public auction by said court and bought in by said Credito Mercantil and thereafter said policy was purchased from said Credito Mercantil by Lucas Amadeo" (R., 26).

Upon filing the above replication the plaintiff also, by leave of court, amended his declaration by inserting in the title of the cause after the name of the plaintiff the words "and Lucas Amadeo," and in the body of the declaration added the following paragraph:

"And the plaintiff avers that said policy of insurance has been given as collateral security on a loan to the Credito Mercantil, a banking institution by the insured *J. A.* Amadeo, and that afterwards, to wit: after the fire in the year 1890 it was sold by an order of court on an attachment writ of the court of the first instance of San Juan Cathedral district in a public auction to said Credito Mercantil, and that afterwards in the year 1896 said policy was acquired by purchase by Lucas Amadeo, one of the plaintiffs herein, of which he is now a part owner subject to the mortgage of the insured to the Caja de Ahorros" (R., 27).

Thereafter the defendant joined issue on the plaintiff's replication (R., 28), and the case came on regularly for trial before the court and a jury (R., 29).

The Trial.

Before the empaneling of the jury the defendant had noted an exception to the ruling of the court allowing Lucas Amadeo to be made a party plaintiff (R., 29).

Thereupon, a jury having been empaneled and sworn (R., 29), the plaintiffs offered in evidence—

1. The insurance policy sued on, which said policy is set forth in full at pages 49–54 of the transcript of record, and the same was admitted by the court (R., 49).

2. A certified copy of the appointment of Robert A. Miller "as special master in this case," and the same was admitted in evidence against defendant's objection, to which ruling of the court an exception was duly noted (R., 54).

3. Copy of the mortgage from Antonio Amadeo to the Caja de Ahorros, which is set forth in full at pages 54–58 of the record, and the same was admitted against the objection of the defendant; to which action of the court an exception was duly noted (R., 59).

4. Plaintiffs then called as a witness Antonio José Amadeo, who testified that in 1884 and 1885 he was the owner of the sugar plantation called "Quebrada Arenas," near Maunabo, Porto Rico; that on September 15, 1884, there was issued to him by Feddersen & Company, general agents of the defendant company in Porto Rico, the policy of insurance sued on "covering the stock of sugar and molasses in the warehouse of his estate 'Quebrada Arenas.'" "On the night of the 6th or 7th of February, 1885, the stock of sugar and molasses so insured and in the warehouse aforesaid was entirely destroyed by fire. Witness notified the company's agents, Feddersen & Company, the morning after the fire, and a commission was sent from San Juan by them, who came a few days after the fire and made examinations and inventories concerning the loss (R., 59) and carried the documents to Feddersen & Company; the documents were specific and in detail and contained all the amounts of the stock of sugar and molasses; they counted the value at the time of the loss; there were about 180 hogsheads of sugar, 20 hogsheads in cooling pans; 50 hogsheads of molasses, and 50 barrels of sugar; there are two quintals

of sugar to the barrel; the hogsheads held from 15 to 16 quintals each; there are 135 to 140 gallons to a hogshead of molasses; at that time a quintal of sugar was worth from $2.75 to $3 Mexican money, and a gallon of molasses from 30 to 60 cents Mexican money; he "made those statements at the time; the commission from the agents in San Juan carried an invoice and inventories to San Juan; he signed it and so did the men who came from San Juan; about two or three months after the fire an adjuster of the company named Watlington came down from New York; he took measurements and made investigations; he left a few days afterwards; a few months after the adjuster left witness had a conversation with Mr. Duplace, now deceased, who had been a partner of the house of Feddersen & Company," and "the agents told him they were no longer the representatives of the company" (R., 60); witness did not know about any more representatives of the company in the island (R., 61).

Defendant objected to the witness testifying as to any conversation with or statements made to him by Duplace on the ground that Duplace was then dead, but the court overruled such objection and an exception to such ruling was duly noted.

Witness further testified that "he had given the policy of insurance sued on as collateral security to the Credito Mercantil, and that he had also mortgaged his property to the Caja de Ahorros, which mortgage he did not pay" (R., 61). He also testified that in the month of May, 1887, he "passed through New York and had a conversation with an adjuster, Mr. Watlington, in the house of Mr. Henry Beste, a merchant of New York," and Mr. Watlington, after some discussion and talk, offered him $25,000 in settlement of his policies of insurance (R., 61).

Defendant objected to so much of the testimony of the witness as related to the alleged conversation with the adjuster Watlington, for the reason that it had not been shown that at the time the same occurred said Watlington was authorized to represent the company or to bind it in any way, or was employed by it; but the court overruled such objection, and to which action of the court the defendant then and there duly excepted.

The witness further testified that the above offer of settlement included "all my policies belonging to him" (Watlington). Witness refused this offer. Afterwards, in the same month of May, witness went to London, where he remained for about 15 months (R., 61). He went to the office of the company every week, sometimes twice a week, to see if they would settle his claims; he was obliged to come back for want of money; he "made personal claim on the company" (R., 62).

Later witness again testified that Watlington had "offered him $25,000 for his policies," to which defendant interposed the further objection that said offer, if made, "was in connection with an offer to compromise the claim of the witness," and was consequently not admissible in evidence, which objection was overruled and exception duly noted.

Witness testified that he held five policies of insurance at the time of the fire and that he did not know exactly how many policies of insurance his brother Federico had upon the property at that time; the sugar and molasses which were destroyed were in the sugar-house, the boiler room, pans, and machinery being in one end of the same building. Witness admitted having received from agents Feddersen & Company, a few days after the fire, a letter acknowledging receipt of his notice to them of the destruction of his property by fire, "and informing him of the vouchers and details required by the company in such case." Wit-

ness identified a copy of such letter, and same was introduced in evidence (R., 62).

Witness further testified that the conversation with the deceased Duplace "was about two years after Mr. Watlington had left for New York" (R., 62).

Witness further testified that in response to the letter above referred to he had given "approximate estimates of the losses in respect to the values of the property burned and also of the value of the stock existing up to that time, as well as a copy of the court's sentence and the verbal proceedings had to ascertain the cause of the fire" (R., 63).

Plaintiffs then called Pedro Battistini, a further witness, who testified that in August, 1898, as a "piece of business that I (he) made with Lucas Amadeo, the brother of Don Antonio," "he went to the office of the company at Liverpool and asked them if they would pay the policy sued on or come to some settlement;" they did not pay it; he saw the secretary of the defendant company, who told him that "he did not want to hear anything about the policy," and "declined to hear or propose any arrangement of settlement;" nothing else was said about the policy, and the secretary was the only man connected with the company that witness saw in connection with it.

No further evidence was offered on behalf of the plaintiffs, and thereupon the defendant offered to read in evidence the deposition of Herbert Stanley Ardran, which had been taken upon a commission duly issued out of the trial court. Prior to admitting said deposition in evidence the court, of its own motion, struck out certain parts thereof, which parts are indicated by italics in the transcript of the record at pages 65 to 69, inclusive. To the action of the court in striking out such parts of said deposition and refusing to permit such parts to be read in evidence the defendant duly excepted (R., 63, 73).

In so much of said deposition as was read in evidence Ardran testified that he was auditor of foreign claims in the foreign department of the Royal Insurance Company; he had held such position since October 1887; he had been connected with the company since 1885 (R., 64); he is familiar with the facts and circumstances connected with the claim growing out of the policy here sued on; the company had declined to pay the loss in question because (1) no definite claim had ever been made upon the company in respect of the loss and damage to the property insured, and (2) because the insured had not furnished invoices of the property destroyed or damaged with the statutory declaration affixed thereto, as required by the company; the insured was notified in writing on the 23d of April and 6th of May 1885, that the documents presented as proofs of the losses were not in due form, and that the claim had been declined as not satisfactory to the company; the insured declined to give any further proofs and abandoned his claim upon the policy. Defendant company has never admitted liability for the loss alleged to have been suffered under said policy and never agreed to pay to the plaintiff or any other person the amount of the policy on account of such loss. The sixth condition of the policy was violated by the insured (R., 65, 66). The attention of the insured was called to the defects in the proofs of loss by letters addressed to the insured on the 23d of April and 6th of May, 1885. The general agents of the company in Porto Rico in 1884 and 1885 were Messrs. Feddersen, Willinck & Co., and Messrs. Feddersen & Co. (R., 66). Messrs. Feddersen, Willinck & Co. represented the defendant from January 15, 1880, to February 15, 1884, and Messrs. Feddersen & Co. from February 15, 1884, to May, 1889. The latter were succeeded as general agents in Porto Rico by Messrs. Sobrinos de Ezquiaga, who had represented the company from May 1889, to the present time. Defendant company had had no other agents in Porto Rico than those above mentioned (R., 67).

2. Defendant then read in evidence, without objection, policies of fire insurance issued by the defendant company as follows:

(*a*) policy in suit for £1,600 in favor of Antonio Amadeo on stock of sugar and molasses in the warehouse of said Antonio Amadeo at "Quebrada Arenas;"

(*b*) policy issued September 15, 1884, for $3,500 in favor of said Amadeo on his rum distillery, machinery, and apparatus at "Quebrada Arenas;"

(*c*) policy issued February 29, 1884, for £500 in favor of Federico Amadeo on stock of goods in the store of said Federico on estate "Quebrada Arenas;"

(*d*) policy issued July 26, 1884, in favor of Federico Amadeo for $6,500 on two buildings of said Federico on the estate "Quebrada Arenas;"

(*e*) policy issued May 19, 1884, by Northern Assurance Company to Antonio Amadeo upon the sugar establishment at "Quebrada Arenas;"

(*f*) policy issued December 21, 1884, by Northern Assurance Company to Antonio Amadeo for $3,400 on bagasse ranchos and cooper shops of said Antonio on the estate "Quebrada Arenas;"

(*g*) policy issued December 21, 1884, by Northern Assurance Company to Antonio Amadeo for $2,500 on the cooperage establishments, stock of cooperage, and building used for storing on the estate "Quebrada Arenas" (R., 70).

3. Defendant then called Thomas Watlington, a witness, who testified that he is a resident of New Jersey, U. S. A., and his occupation is that of an adjuster of losses (R., 70); in 1885 he visited Porto Rico for the purpose of ascertaining and adjusting the loss under the policies issued to Antonio and Federico Amadeo by both the Royal Insurance Company and the Northern Assurance Company; he went there at that time as a special agent in that case only; he arrived at Maunabo on Sunday, April 12, 1885; saw An-

tonio Amadeo, and on behalf of the defendant company demanded from him proofs of loss with reference to the amount of sugar and molasses claimed to have been lost or destroyed under the policy here sued on; Amadeo refused to furnish such proofs, and refused to give witness the evidence he asked for in order to verify the claim, and refused to give witness any information as to the value of the sugar and molasses; witness told Antonio Amadeo that there was absolutely no evidence to show for the claim of £1,680, and that he (Watlington) wanted something to enable him to judge what that stock was; Amadeo did not file a particular account of the articles damaged by the fire, as required by the sixth condition of the policy, and he (witness) told Antonio Amadeo that in the claim as filed by him the amount of the stock was not shown at all; that his claim was therefore rejected, and that he would be required to furnish evidence of the stock itself (R., 71); he inquired of Amadeo how he arrived at the value of the stock, and the latter declined to tell him, and so far as witness is informed Antonio Amadeo never furnished any proofs of loss to the company; witness left Maunabo April 16, 1885, having first told Antonio Amadeo that all of his claims were rejected, and returned to New York and terminated his services in the matter for the defendant company; he was employed for the special service for the time being to investigate the loss in question and to report to the company (R., 72). He told Antonio Amadeo that he had come to Porto Rico representing the two companies for the purpose of ascertaining the circumstances connected with his losses and making a proper adjustment of them; at that time Feddersen & Co. were the general agents of the company and remained there as such for several years thereafter; witness saw Antonio Amadeo in New York, at the office of Mr. Beste, in 1887; he met Antonio Amadeo there at the latter's request; at that time witness was not an employee or representative or agent of the Royal

Insurance Company; he was present "in an advisory capacity for the benefit of all parties;" he told Amadeo that "to save further trouble" he "would suggest to the companies that they settle the losses at twenty-five thousand dollars" (R., 72); at that time he (witness) did not have any authority to act for the Royal Insurance Company, and that twenty-five thousand was to include all policies of both companies to both the insured and was to cover the entire transaction; he (witness) told Amadeo that he was not authorized to represent the companies, but would do what he could to bring about a settlement; he "had no authority in the matter but was quite willing to give any information he had to either party;" he bound nobody; both companies had to be consulted and their consent obtained before anything would be binding on them (R., 73); witness could not then have adjusted the claims unless the companies affirmed what he did; witness was not the agent of the company and was not the man to receive further proofs (R., 74).

4. Defendant then read in evidence a certified copy of the judicial proceedings showing the award of the policy sued on to the Credito Mercantil, a banking institution at San Juan, Porto Rico, by an order of the court dated February 16, 1885.

5. Defendant then called as witnesses Westremundo Ortiz, Victoriano Amaro, Celestino Colon, and Juan Lebron, who gave evidence tending to prove that the fire which caused the loss complained of was of incendiary origin, and that Antonio and Federico Amadeo both had guilty knowledge of such fact (R., 74–75).

6. Defendant then called as witness Miguel Arzuaga, who testified that since May, 1889, the firm of Sobrinos de Ezquiaga & Company had been the general agents of the Royal Insurance Company in San Juan, Porto Rico, for the whole

island; that that firm had succeeded Feddersen & Company, who had been the general agents of the company from 1884 up to 1889; Feddersen & Company were the general agents in San Juan, and they had subagents at different points on the island; Feddersen & Company succeeded Feddersen, Willinck & Company in 1882 and continued the business to May, 1889, when Sobrinos de Ezquiaga took it; "the defendant company has been continuously represented in Porto Rico since the time of the fire" (R., 75).

7. Defendant having offered in evidence the record of the suit in equity No. 91 of this court by Robert Miller, special master, against Antonio José Amadeo for the foreclosure of the mortgage executed by said Amadeo in favor of the Caja de Ahorros, the plaintiffs admit "that this mortgage has not been enforced as against the property mortgaged by Don Antonio José Amadeo to the Caja de Ahorros, and the land so mortgaged has not been sold for the purpose of realizing said debt and exhausting the remedy under said mortgage" (R., 76).

8. "No evidence was offered by either party proving or tending to prove any transfer of the policy sued on or the proceeds thereunder by or from the Credito Mercantil to either of the plaintiffs in this case; nor did plaintiffs offer any evidence proving or tending to prove that a suit had been brought upon the policy herein within fifteen years after the fire occurred, or that the company or any agent thereof duly authorized had acknowledged the claim of loss under said policy, in writing, within such period of fifteen years" (R., 76).

Both parties having rested, the attorneys for the defendant moved the court to direct a verdict in favor of the defendant for the following reasons:

1. The alleged cause of action is under the pleadings and proofs prescribed by limitation.

2. Because the plaintiff Miller has no right to recover herein.

3. Because the plaintiff Lucas Amadeo has no right to recover herein, and has been improperly joined as a party plaintiff.

This motion was overruled by the court and an exception to such ruling was duly noted of record (R., 76).

Thereupon the attorneys for the defendant requested the court to instruct the jury in its behalf as follows:

1. The court instructs the jury that if they believe from the evidence that at the time that Antonio J. Amadeo had the conversation with the witness Watlington in the office of Henry Beste in New York said witness was not an agent of or employed by the defendant company, then nothing that he may have said or done at that time could bind the defendant company (R., 76).

2. The court instructs the jury that unless you believe from the testimony that a suit has been brought against defendant company to recover on the policy herein within fifteen years after the fire occurred, or unless defendant company by an agent duly authorized acknowledged the claim in writing within such period of fifteen years, plaintiff can not recover herein (R., 77).

3. The court instructs the jury that unless a demand was made by Antonio Amadeo, or some one for him, upon the defendant company or upon some agent having authority to represent it, in the presence of witnesses called for that purpose, within fifteen years prior to the bringing of this suit on April 23rd, 1902, plaintiff cannot recover (R., 77).

5. The court instructs the jury that neither the Caja de Ahorros nor Robert Miller, special master, has any right to recover against defendant on account of any policy of insurance upon personal property, and if you believe that the property insured under the policy sued on was sugar and molasses, you must find for defendant (R., 77).

Each of which instructions the court declined to give, and to such rulings of the court the attorneys for plaintiffs then and there duly noted exceptions (R., 77–83).

Thereupon the court of its own motion instructed the jury, among other things, as follows:

There is also testimony tending to show that something over three months after that fire occurred, or about three months or a little over, after these proofs of loss had been furnished, that an agent selected by the company to adjust this loss came to Porto Rico on behalf of this company. There is nothing showing in this case that his power as to the adjustment of this loss was restricted in any way on the part of the company, or that the insured had any knowledge it was restricted. At that time, after an investigation, this adjuster notified the insured that the proofs of loss were not sufficient.

If a person representing the company had been sent there to examine into that matter, and had done so, and in connection with the insured had prepared a statement of that loss, and it had been furnished to the company, then that was all the insured was required to do. In other words, if an agent representing the company had acted in connection with the insured and had prepared a statement of the loss, and it had been furnished to the company, then if the company, within a reasonable time after it could have examined that proof of loss, did not make any objection to that proof of loss and inform the insured of it, then that was a waiver, in law, of objection to that proof of loss. Objections three months or more after the time the agent who was sent there to adjust that loss reported to the company was not an objection within a reasonable time, especially if it be true that someone representing the company and the insured had in conjunction made out a proof of loss.

* * * * * * *

There is testimony tending to show that the proofs of loss were furnished within fifteen days after February 6th, 1885.

The insurance company is, in law, entitled to a reasonable time within which to examine that statement of loss and see whether it will make any objections to it, and if it makes no objections to it within a reasonable time, then that loss, whatever it may be, becomes due from that period. The limitation as to this character of an action was fifteen years from the time that loss became due. Originally there was no such thing as limitations to actions. A man, originally, could sue within a hundred years from the time the right of action

accrued, but the law-makers in their wisdom saw fit, as to all actions, to prescribe periods of time within which they could be brought, and an action of this character had to be brought, according to the statute of limitations in force at that time, within fifteen years from the time the loss became due, or else the party was not entitled to maintain it. There could be a suspension of that statute of limitations. In other words, there could be a chopping off or cutting down of the time that barred the action by the conduct of the parties.

There is testimony tending to show that in May, 1887, the insured, Antonio Amadeo, went to New York; that he there found the agent who had been sent to Porto Rico in 1885 to adjust this loss. There is testimony tending to show that he then demanded a settlement of that loss. There is testimony tending to show that at that time that agent, who had come here to Porto Rico as an adjuster of that loss, offered him in settlement of this policy and other policies upon that property the sum of twenty-five thousand dollars. Upon the other hand, it is said that there was not such an offer; that the party merely said to the insured, "I will use my good offices in trying to get a settlement for twenty-five thousand dollars," and it is stated that there was no offer of a certain sum in settlement of that loss. It is for you to determine, from all the evidence in the case, what actually occurred.

I say to you, as a master of law, that if the company sent a man to Porto Rico in 1885 to settle this loss, with general power to adjust and settle it, although his power only applied to this loss, that then, unless the insured, Antonio Amadeo, had notice that his agency as to that loss had ceased, or that it had been restricted in some way, or had ended, he had the right in law, and the company, as a matter of law, were still holding him out to the insured as the adjuster to settle that loss,—the insured had a right, in law, to apply to that adjuster and demand of him a settlement of that loss. If it be true, as is contended by the one side, that at that time that party made an offer absolutely and unconditionally of so much in settlement of this and other policies, that would cut off for the time and stop the running of the statute of limitations, and his action, if the company had given no notice to the insured that the adjuster's agency had ended, cut off the running of the statute of limitations, and you will readily see that from May, 1887, until the time this action was brought is not a period of fifteen years, and therefore the limitation will not apply.

Upon the other hand, if you believe from the testimony that the insured was either notified at that time that that party who had been the adjuster was no longer the adjuster and had no power to act, then that offer was not binding on the company; or, if you believe from the testimony that the offer of so much in settlement was not made at that time, and that it was only an offer on the part of the party to do what he could to bring about a settlement, he merely acted as a friend or intermediary, then it would have no operation in suspension of the statute.

Further than that, the testimony tends to show that in August, 1898, a gentleman by the name of Battistini went to Liverpool and demanded payment of this company in settlement of the policy, he acting at that time, as the testimony tends to show, upon the part of the insured; that he then had the policy with him and was acting also for Lucas Amadeo, who had become interested in the collection of this insurance; that he saw the secretary of the company and that the secretary did not pay the policy or want to have anything to do with it. If you believe from the testimony that this party, Battistini, acting for the insured and for Lucas Amadeo, went to Liverpool and demanded payment of this claim, and there was an offer to pay, or an agreement to pay a certain sum on it, then that would also stop the running of the statute of limitations and would cut off the time. Even if there had existed no such state of case as I have named to you between the agent of the company who came to Porto Rico to adjust this loss and Amadeo in the month of May, 1887, in New York, even if that had not occurred, then this would stop the running of the statute of limitations, if there was not only a demand of payment but an offer of payment.

If you believe, therefore, that from the time this loss became due, as I have indicated to you, until this action was brought, a period elapsed of more than fifteen years, but that there had been a waiver or waivers of the statute of limitations, as I have indicated to you might be done, then this action is maintainable; if, upon the other hand, there had been no waiver in any way of the statute of limitations, and if more than fifteen years had elapsed from the time the loss occurred to the bringing of this suit, then it is barred by the statute (R., 79–82).

* * * * * * *

Thereupon attorney for the defendant duly excepted to so much of the charge of the court as instructed the jury that "if a person representing the company had been sent there to examine into that matter, and had done so, and in connection with the insured had prepared a statement of that loss, and it had been furnished to the company, then that was all the insured was required to do" (R., 79, 84), for the reason that such instruction eliminated the matter of the company's authority under the conditions of the policy to exact compliance from the insured with the requirements of the policy as to proofs (R., 84).

The attorney for the defendant further excepted to so much of the court's charge as related to the alleged demand by Amadeo on Watlington in New York in May, 1887, and the offer of settlement alleged to have been made by Watlington at that time for the reason that there was no evidence tending to show that the said Watlington at the time of making the alleged offer of settlement in question had any authority to act for the defendant company, it being incumbent upon the insured to ascertain the authority of the supposed agent with whom he was dealing (R., 84).

Attorney for the defendant also excepted to so much of the court's charge as instructed the jury that if the company had sent a man to Porto Rico in 1885 with a general power to adjust and settle this loss, then, unless the insured had notice that his agency as to that loss had ceased or that it had been restricted in some way or had ended, he (the insured) had the right in law to apply to that adjuster and demand of him a settlement of that loss—the company, as a matter of law, was still holding him out to the insured as the adjuster to settle that loss—and "if his company had given no notice to the insured that the adjuster's agency had ended," his offer "absolutely and unconditionally of so much in settlement of this and other policies, would cut off for the

time, and stop the running of the statute of limitations," on the grounds next above given, and for the further reason that "there is no evidence tending to show that Watlington was the representative and agent of the company at the time (the alleged offer of settlement was made) or had authority so to bind it" (R., 85).

Attorney for the defendant further excepted to so much of the court's charge as instructed the jury that the alleged demand by the witness Battistini was made on behalf of the insured as well as of the plaintiff Lucas Amadeo, and that such demand, if made as testified, would operate to stay the running of the statute of limitations, for the reason that no testimony had been given tending to prove that any agent of the defendant company had ever offered to pay the policy sued on or any part thereof, and that no acknowledgment of the debt had been made in writing by the company or any agent thereof, nor was any suit brought thereon within fifteen years after the loss occurred, and for the further reason that upon the evidence Battistini was representing Lucas Amadeo alone, who, so far as this record discloses, had no interest in said policy or the proceeds thereof at any time (R., 85–86).

Attorney for the defendant further excepted to so much of the court's charge as instructed the jury that a mere demand for payment not in writing was sufficient to toll the statute of limitations (R., 86).

The jury, having retired, returned a verdict against the defendant insurance company in the words and figures following:

"We, the jury, find for the plaintiffs in the total amount of $12,000" (R., 30).

A motion for a new trial was then filed on behalf of the defendant, assigning many errors which had occurred in the course of the trial, including, among others, those indicated by the exception noted above (R., 30–33).

A motion in arrest of judgment was also filed on behalf of the defendant company, assigning, among other grounds, the following:

1. Error on the part of the court in overruling the demurrer of defendant to the amended declaration.

2. Error on the part of the court in permitting Lucas Amadeo to become a party plaintiff and to sue the defendant in the pending case upon a cause of action separate and distinct from that alleged by the original plaintiff, Miller, as special master.

3. Because of misjoinder of causes of action in the parties plaintiff.

4. Because under the pleadings and proofs neither of the plaintiffs had any right to recover herein.

5. That the verdict of the jury is irregular and void, in that it was not sustained by the pleadings and proofs (R., 34).

Both the motion in arrest of judgment and for a new trial having been heard and overruled, the attorneys for the defendant excepted to the action of the court in overruling the motion in arrest of judgment (R., 35), and thereupon judgment was entered requiring "the defendant, The Royal Insurance Company of Liverpool, to pay to the plaintiffs, Robert Miller, special master, and Lucas Amadeo, the sum of $12,000 and interest thereon at 6 per cent. per annum from this date until paid, together with the costs of this action, to be taxed by the clerk of this court."

ASSIGNMENTS OF ERROR.

1.

It was error on the part of the trial judge after the case was at issue to permit the plaintiff to join Lucas Amadeo as a party plaintiff in the cause and to further so amend the declaration as to join with the original cause of action therein set forth a new and inconsistent cause of action.

2.

It was error on the part of the trial judge to overrule the motion of the defendant, made at the conclusion of the testimony, to direct a verdict in favor of the defendant.

3.

It was error on the part of the trial judge to refuse to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that at the time that Antonio J. Amadeo had the conversation with the witness Watlington in the office of Henry Beste in New York said witness was not an agent of or employed by the defendant company, then nothing that he may have said or done at that time could bind the defendant company" (R., 76).

4.

It was error on the part of the trial judge to refuse to instruct the jury as follows:

"The court instructs the jury that neither the Caja de Ahorros nor Robert Miller, special master, has any right to recover against defendant on account of any policy of insurance upon personal property, and if you believe that the property insured under the policy sued on was sugar and molasses, you must find for defendant" (R., 77).

5.

It was error on the part of the trial judge to instruct the jury, among other things, as follows:

* * * "If a person representing the company had been sent there to examine into that matter and had done so, and in connection with the insured had prepared a statement of that loss, and it had been furnished to the company, then that was all the insured was required to do."

* * * "Objection three months or more after the time the agent who was sent there to adjust that loss reported to the company, was not an objection within a reasonable time, especially if it be true that some one representing the company and the insured had in conjunction made out a proof of loss."

* * * "I say to you, as a matter of law, that if the company sent a man to Porto Rico in 1885 to settle this loss, with general power to adjust and settle it, although his power only applied to this loss, that then, unless the insured, Antonio Amadeo, had notice that his agency as to that loss had ceased, or that it had ended, he had the right in law, and the company, as a matter of law, were (was) still holding him out to the insured as the adjuster to settle that loss,—the insured had a right, in law, to apply to that adjuster and demand of him a settlement of that loss. If it be true as is contended by the one side, that at that time that party made an offer absolutely and unconditionally of so much in settlement of this and other policies, that would cut off for the time and stop the running of the statute of limitations, and his action, if the company had given no notice to the insured that the adjuster's agency had ended, or cut off the running of the statute of limitations, and you will readily see that from May, 1887, until the time that this action was brought is not a period of fifteen years, and therefore the limitation will not apply."

* * * "Further than that, the testimony tends to show that in August, 1898, a gentleman by the name of Battistini went to Liverpool and demanded payment of this company in settlement of the policy, he acting at that time, as the testimony tends to show, upon the part of the insured; that he then had the policy with him and was act-

ing also for Lucas Amadeo, who had become interested in the collection of this insurance; that he saw the secretary of the company and that the secretary did not pay the policy or want to have anything to do with it. If you believe from the testimony that this party, Battistini, acting for the insured and for Lucas Amadeo, went to Liverpool and demanded payment of this claim, and there was an offer to pay, or an agreement to pay a certain sum on it, then that would also stop the running of the statute of limitations and would cut off the time. Even if there had existed no such state of case as I have named to you between the agent of the company who came to Porto Rico to adjust this loss and Amadeo in the month of May, 1887, in New York, even if that had not occurred, then this would stop the running of the statute of limitations, if there was not only a demand of payment but an offer of payment."

6.

It was error on the part of the trial judge to admit the testimony as to the alleged demand on and the verbal offer of the witness Watlington when in New York in 1887 to settle the insurance claims of Antonio Amadeo, and it was also error on the part of the trial judge to admit the testimony concerning the alleged demand of the witness Battistini when in London in 1898.

JURISDICTION.

The action was begun by Robert Miller, "as special master," against "The Royal Insurance Company of Liverpool, a foreign corporation organized under the laws of England and doing business in Porto Rico" (R., 1).

The declaration was subsequently amended by adding "in the title of the case, after the name of the plaintiff," the words "and Lucas Amadeo" (R., 27).

No averment as to the citizenship of either Robert Miller or Lucas Amadeo appears in the record.

Section 702 of the Revised Statutes of the United States is as follows:

"The final judgments and decrees of the supreme court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the Territory of Washington the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the supreme court of said Territory in any cause (when) the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

The provisions of this section were modified by the act of March 3, 1885 (23 Stats., 443), entitled "An act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories," by which it was provided as follows:

"SEC. 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

Sections 8 and 35 of the act of April 12, 1900 (31 Stats., 77), entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," are as follows:

"SEC. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States: *Provided*, That so much of the law which was in force at the time of cession, April eleventh, eighteen hundred and ninety-nine, forbidding the marriage of priests, ministers, or followers of any faith because of vows they may have taken, being paragraph four, article eighty-three, chapter three, Civil Code, and which was continued by the order of the secretary of justice of Porto Rico, dated March seventeenth, eighteen hundred and ninety-nine, and promulgated by Major General Guy V. Henry, United States volunteers, is hereby repealed and annulled, and all persons lawfully married in Porto Rico shall have all the rights and remedies conferred by law upon parties to either civil or religious marriages: *And provided further*, That paragraph one, article one hundred and five, section four, divorce, Civil Code, and paragraph two, section nineteen, of the order of the minister of justice of Porto Rico, dated March seventeenth, eighteen hundred and ninety-nine, and promulgated by Major General Guy V. Henry, United States volunteers, be, and the same hereby are, so amended as to read: 'Adultery on the part of either the husband or the wife.'"

* * * * * * *

"SEC. 35. That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States, and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which

the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language."

But section 3 of the act of March 2, 1901 (31 Stats., 593), entitled "An act to amend an act entitled 'An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, and to increase the salary of the commissioner of education provided for by said act," is as follows:

"SEC. 3. That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

It has been decided that none of the provisions of the act of March 3, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes" (26 Stats. at L., 826), apply to cases involving final judgments of the district court of the United States for Porto Rico.

Royal Ins. Co. *vs.* Martin, 192 U. S., 149, 159.

The district court of the United States for the district of Porto Rico is a "territorial" or "colonial" court. As such its jurisdiction is as the Congress of the United States may from time to time, until the island shall have become "a part of the United States," declare it to be. The limitations imposed by section 2 of article III of the Constitution with respect to the "judicial power" have no application to such courts, for they "are legislative courts, created in virtue of the general right of sovereignty which exists in the Govern-

ment;" the jurisdiction with which they are invested is not a part of the judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the Territories of the United States, and in legislating for them Congress exercises the combined powers of the General and of a State government.

American Ins. Co. *vs.* Canter, 1 Peters, 511.
Benner *vs.* Porter, 9 Howard, 235.
Downes *vs.* Bidwell, 182 U. S., 265 *et seq.*

The Congress having conferred upon the district court of Porto Rico jurisdiction in cases "where the parties or either of them are" * * * "citizens or subjects of a foreign State or States wherein the matter in dispute, exclusive of interest or costs exceeds the sum or value of one thousand dollars," the district court of the United States for the district of Porto Rico had jurisdiction to hear and determine this case, for it appeared from the face of the declaration that the amount in dispute was in excess of $8,000, and the verdict of the jury against the defendant was for $12,000, exclusive of interest or costs; and with respect to the citizenship of the parties, while nothing is averred as to that of the plaintiffs, it is expressly averred that the defendant "The Royal Insurance Company of Liverpool" is "a foreign corporation organized under the laws of England."

Such an averment is sufficient, even if measured by the strict requirements of Muller *vs.* Dows, 94 U. S., 444, 445, and American Sugar Refining Co. *vs.* Johnson, 60 Fed. Rep., 508, 510.

As the trial court had jurisdiction of the cause, this court has jurisdiction to review the final judgment herein, both by reason of the amount in dispute and because during the course of the trial an act of Congress was brought in question and the right claimed thereunder was denied.

Hijo *vs.* United States, 194 U. S., 315, 320.
Royal Insurance Co. *vs.* Martin, 192 U. S., 149, 156.

Merits.

The defenses in this case, speaking generally, turn upon two propositions:

1st. That no cause of action in favor of the plaintiffs or either of them was established against the defendant.

2d. If a cause of action was established by the proofs in favor of the plaintiffs or either of them, recovery upon it was barred by prescription under the law of Porto Rico in force at the time of the trial.

For the purposes of this writ of error both of these defenses were invoked in the broadest possible manner by the motion for verdict made by the defendant at the close of the evidence and are preserved by the second assignment of error.

Each of the remaining assignments of error, though good in itself and presenting sufficient ground for reversal of the judgment complained of, will be found upon analysis to but present some subordinate phase of either one or other of the above propositions.

For convenience, then, the first and second assignments of error will be considered together under the following heads, viz:

(*a.*) Do the pleadings disclose any right of action against the defendant in favor of the plaintiff "Robert Miller, as special master," &c.?

(*b.*) Do the pleadings disclose any right of action against the defendant in favor of the plaintiff Lucas Amadeo?

(*c.*) If any cause of action is disclosed by the pleadings, is it sustained by the proofs?

(d.) If the pleadings disclose any rights of action in favor of the plaintiff, are such rights of action joint or several, and if the latter, are they capable of being consolidated or joined together in a single action?

(e.) If so, is such cause of action barred by prescription under the laws in force in Porto Rico at the time of the trial below?

The suit was instituted April 23, 1902, by Robert Miller alone "as special master." Lucas Amadeo was not made a party plaintiff until May 13, 1903. The policy of insurance sued upon was issued by the defendant company April 15, 1884, in favor of Antonio Amadeo, and insured him against loss "on stock of sugar and molasses deposited in the sugar manufactory on the estate 'Quebrada Arenas'" (R., 50).

The manufactory in question, with its contents, was destroyed by fire during the night of the 6–7 of February, 1885 (R., 6).

The insured declined to furnish proofs as to the amount and value of the stock at the time of the loss, as was required by the policy, and the company declined to pay the alleged loss (R., 70).

The insured never brought suit nor undertook other proceedings to establish his claim, and no action of any kind looking to the establishment of a right to recover on the policy was taken until the commencement of the present suit by Miller claiming through the mortgage executed by the insured and next referred to.

The declaration avers that the insured, Amadeo, on or about the 19th day of September, 1884, "mortgaged to the said Caja de Ahorros said property insured, together with the sums insured upon the said property" (R., 6); that the said Caja de Ahorros de la villa Ponce has been declared a

bankrupt by the competent court of the first instance of Ponce, and that in a certain proceeding between the creditors and the trustees of the bankrupt, "now pending in the United States district court of Porto Rico, the plaintiff Robert A. Miller has been duly appointed * * * a special master with the power and duty to collect judicially or extrajudicially all the assets of the said Caja de Ahorros de la villa Ponce, of which assets the sums due herein for the insurance of said property form a part;" that said plaintiff was invested with all the rights and interest of the said insured Amadeo, in and to the said mortgaged property and is entitled to collect the sums due from the defendant on the insurance of said property for the benefit of the creditors of the Caja de Ahorros.

(a and c.) Admitting for the purposes of argument the capacity of Miller to sue on behalf of the Caja de Ahorros and its creditors, does the declaration disclose any cause of action in his favor against the defendant?

The right of suit in favor of Miller, if any exists, grows out of the alleged transfer of Amadeo's interest in the stock of sugar and molasses to the Caja de Ahorros by the mortgage of September 14, 1884.

There is no averment that the alleged mortgaging of either the "property insured" or "the sums insured upon the said property" was made known to the insurer.

Condition 5 of the policy provides:

"This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given to the company and the subsistence of the insurance in favor of such other person be declared by a memorandum endorsed thereon by, or on behalf of the company" (R., 51).

Was either the stock of sugar and molasses or the insurance policy covering the same and herein sued upon capable in law of being mortgaged?

The mortgage law of Spain, which had been in force in the Peninsula for more than thirty years, was extended to Porto Rico May 1, 1880. It was amended in some particulars, not important here, in May, 1893. At the time of the making of the mortgage upon the stock of sugar and molasses covered by the insurance policy here sued upon, the mortgage law of Porto Rico contained the following provisions, viz:

"The following only are mortgagable:
"1. Real property.
"2. Property rights in the realty, alienable in accordance with the laws."

Article 114 of the law of May, 1880, being also article 106 of the law of 1893, War Department translation, 1899.

It also contained this further article, viz:

"The following are not mortgagable:
"1. Growing crops and unpaid rents, separated from the estate which produces them.
"2. Chattels permanently located in buildings, either useful or ornamental, or for the service of some industry, unless they are mortgaged with said building."

* * * * * * *

Article 116 of the law of 1880; article 108 of the law of 1893.

"A mortgage extends to natural increase, improvements, growing crops, and rents not collected when the obligation falls due, and the value of indemnities allowed or due the owner for insurance on the property mortgaged, or by virtue of condemnation by right of eminent domain" (article 116 of the law of 1880; article 110 of the law of 1893).

"In accordance with the provisions of the preceding article, the following shall be considered mortgaged together

with the estate, provided they belong to the owner of the estate, although they are not mentioned in the contract:

"1. Chattels permanently located in a building, either useful or ornamental, or for the service of some industry, even though they were placed there after the creation of the mortgage.

"2. Improvements consisting of new plantings, works of irrigation or drainage, repairs, works for safety or alterations, comfort, ornamentation or raising of buildings, and any other similar works, which do not consist of additions to the land, except natural accretions, or in the new construction of buildings, where previously none existed.

"3. Crops, which at the time the obligation falls due, are growing on the trees and plants, or have already been harvested, but not yet removed or warehoused.

"4. Rents due and not yet paid, whatever may be the reason they have not been collected, and such as shall have to be paid until the creditor has recovered his whole credit.

"5. Indemnities awarded or due the owner of the mortgaged realty, either for the insurance thereof or for the crops, provided the damage occurred after the creation of the mortgage, or on account of condemnation of the land by the right of eminent domain."

Article 119 of the law of 1880; article 111 of the law of 1893.

The colonial minister, Señor Maura y Montaner, in submitting the law of 1893 to the Cortes for its approval, said:

"This law, embracing real property only, cannot be applied to products when considered apart from the soil itself; agricultural credit cannot be embraced by a credit of the land" (War Department translation, 1899, p. 7).

The pending action is a "personal action," "accion personal." It arises from a purely personal obligation, the contract of insurance, and is capable of being enforced solely against the company bound thereby.

The contract of insurance is a personal contract. It does not constitute a lien upon the property described therein, and in the hands of its owner and his assignees or succession it con-

stitutes personal property, for by the Spanish law "personal properties" are defined to be "all that can be carried from one place to another, and all which can move naturally by itself" (Ley 4, Titulo 29, Partida 3), and "real properties" are all that cannot be moved from one place to another without being damaged or injured. Trees and plants and ungathered crops or products not yet separated from the land form an integral part of real property, but such crops and products when harvested, though they yet lie upon the land, are to be considered as personal property (Diccionario Razonado de Legislacion y Jurisprudencia por Don Joaquin Escriche, p. 377, Bienes inmurbles).

The property insured, being "a stock of sugar and molasses" deposited in a sugar manufactory, was clearly personal property. It falls not within the definition of real property or of a "property right in the realty alienable in accordance with the laws," and, therefore, under the mortgage law it was not mortgageable.

Admitting, then, *arguendo* that Antonio Amadeo, the insured, had attempted to mortgage the stock of sugar and molasses to the Caja de Ahorros and that said Amadeo had been absolutely debarred and foreclosed by order of court from all equity of redemption in and to the property so attempted to be mortgaged, and that said Miller, by orders in bankruptcy, had been authorized to sue for all assets of the Caja de Ahorros, still he would have no cause of action under the policy in question against the defendant company, because said stock of sugar and molasses, being personal property, was not mortgageable, and any attempted mortgage of it would not be enforceable in law.

Upon the pleadings, then, it would seem that the plaintiff, Miller, had failed to state a cause of action, and the defendant's demurrer to this declaration should have been sustained.

Upon the evidence, the case against the plaintiff is so much the stronger. A perusal of the mortgage set forth at page *54 et seq.* of the record demonstrates beyond peradventure that the stock of sugar and molasses warehoused in the sugar manufactory was not intended to be included within its terms.

The mortgage recites that Antonio Amadeo is the legitimate owner of a sugar plantation called "Quebrada Arenas," "composed of seventy-six hectares, thirty-five acres, seventy-two centares" of land, "all planted in cane, with the exception of the land occupied by the buildings, yards, and lanes," with "the proper establishments for the manufacture of sugar, including a warehouse for sugar, a steam engine, a cooper-shop, a rum-house, and a dwelling-house," all of which establishments, with the exception of the dwelling-house, are insured against fire by the Northern Insurance Company of London and Royal Insurance Company (R., 55); that by "common agreement between the said contracting parties they have appraised the said plantation in the sum of sixty thousand pesos, current commerce money;" that Amadeo is indebted to the Caja de Ahorros in the sum of $15,036.27, advanced to him as a loan to assist in the development and keeping "of the aforementioned property," and has agreed "to secure the aforementioned credit with a first mortgage *on the plantation above referred to*" (R., 56), and as guarantee of this loan the grantor, Amadeo, "constitutes a voluntary mortgage on the property described and the fruits thereof" for said amount of $15,036.27, etc., and the director-president of the Caja de Ahorros accepts this deed in the form in which it is made (R., 57).

At no point in the mortgage is the existence of the stock of sugar and molasses warehoused upon the estate mentioned in the mortgage or even hinted at. The phrase "and the fruits thereof" cannot be construed to embrace personal property such as this, for crops or products of the land which have been harvested and warehoused are no longer

realty, and hence are not mortgageable. The "fruits thereof" must be construed to embrace the crops and products of the mortgaged lands which, at the time the mortgage obligation falls due, "were growing upon the trees and plants, or had been already harvested, but not yet removed or warehoused" (see article 111 of the law of 1893, *ante*, paragraphs 3 and 7).

As the stock of sugar and molasses had already been manufactured from the cane and warehoused prior to the giving of the mortgage to the Caja de Ahorros, and was thereby constituted personal property, and was neither "real property," nor "crops growing on the trees and plants, harvested but not yet removed or warehoused," it seems certain that it was not mortgageable, and therefore the plaintiff, Miller, acquired no rights under the mortgage in question, either to the stock of sugar and molasses nor to the insurance indemnities connected therewith, for the only insurance indemnities capable of being included under the mortgage law in question as an incident of a mortgage are "indemnities awarded or due the owner of the *mortgaged realty* either for the insurance thereof or for the crops" (sec. 7 of article 111, mortgage law, *supra*). In addition to this it was admitted on the trial that the mortgage in question had not been foreclosed against Antonio Amadeo (R., 74).

Unless the Caja de Ahorros could have maintained an action upon the policy against the defendant company to compel payment of the alleged loss, it is plain that the plaintiff Miller, whether as "special master" or as "receiver," with power to sue for the assets and credits of the Caja de Ahorros, could not maintain such an action, for neither the Caja de Ahorros nor the plaintiff Miller was at any time in judicial possession either of the property insured or of the policy of insurance itself, it being admitted that the "mortgage has not been enforced as against the property mortgaged by Don Antonio José Amadeo to the Caja de Ahorros, and the land so mortgaged has not been sold for

the purpose of realizing said debt and exhausting the remedy under said mortgage" (R., 76).

The judicial procedure necessary to bring about a public sale of mortgaged properties is set forth in article 128 of the mortgage law (War Department translation, p. 35) and article 172 *et seq.* of general regulations for the execution of the mortgage law (War Department translation, 1899, p. 51), it being provided by article 174 (p. 52) of said general regulations that when an estate has been sold or awarded and the price has been paid "the instrument of transfer or the decree of award shall be officially executed by the inferior court representing the owner of the mortgaged property should the latter not appear voluntarily to execute it on the day fixed," and "the new owner shall immediately thereafter be placed in judicial possession should he request it." Neither the Caja de Ahorros nor the plaintiff Miller having been put in "judicial possession" either of the insurance policy or having had their right to receive the proceeds thereof under the mortgage judicially declared, it seems patent that under the Spanish laws neither the one nor the other could have maintained an action against the defendant company by virtue of a pending judicial proceeding to secure a mortgage foreclosure.

In the Spanish law an action is the exercise of a right, and until the right itself exists an action thereabouts cannot be maintained.

Actions are the ways by which we claim our things judicially, and they must be exercised in accordance with the rules established by the law (decision of supreme court of Madrid, March 27, 1858; Derecho Procesal de España by Don Jose Robles Pozo, volume 1, page 380).

Nobody is entitled to the exercise of an action who has not the right of action itself (*ib.*, volume 1, page 380).

The courts must not entertain actions founded upon suppositions, and the less so when such suppositions may have been negatived by facts stated by the plaintiff himself (decision, supreme court of Madrid, October 7, 1854; *ib.*, volume 1, page 381).

Under the law existing in Porto Rico, both at the time of the execution and delivery of the mortgage to the Caja de Ahorros and at the time of the trial, neither the pleadings nor the proofs disclosed any cause of action whatever in favor of Miller against the defendant company.

(*b* and *c*.) By its amended plea filed February 6, 1903, the defendant set up the fact that the insured Antonio Amadeo "on the 3d day of September, 1884, assigned, transferred, pledged, and hypothecated to the Credito Mercantil, a bank of San Juan, Porto Rico," * * * "the said policy free from claim of the said Caja de Ahorros or any other person, and that at the date of the execution of the said mortgage described in the declaration the said Credito Mercantil were the owners and holders of said policy, subject to the payment of an indebtedness of a large amount to it by the said Antonio Amadeo;" and thereafter, while in the possession of and subject to the claims and interests of the said Credito Mercantil, said policy was attached in a suit by the Credito Mercantil against Amadeo, in which suit judgment was entered by the court against Amadeo and "the sale of the said policy of insurance to satisfy the debt of the said Credito Mercantil" was ordered; and thereafter, on the 22d of May, 1890, said policy was sold at public auction; and therafter, on the 6th of August, 1891, said policy was adjudicated and awarded to the said Credito Mercantil, and in accordance with the law and practice then existing said policy was thereafter duly conveyed to such purchaser "free and clear of the rights of all other persons whatsoever," and "that no transfer or assignment of the rights or interest in (of) the

said Credito Mercantil in and to such policy of insurance, or the losses thereunder, has ever been had or made to plaintiff herein or to the said Caja de Ahorros" (R., 24, 25).

To this amended plea the plaintiff replied on the same day admitting the averments with respect to the non-transfer of said policy by the Credito Mercantil "to plaintiff herein or to the said Caja de Ahorros," but averred that the insured Amadeo gave said policy as collateral security for a loan made to him by the Credito Mercantil and that an order of attachment was thereafter issued by the court of first instance of San Juan and the policy was, after the loss by fire, sold at public auction by said court and "bought in by said Credito Mercantil, and thereafter said policy was purchased from said Credito Mercantil by Lucas Amadeo" (R., 26).

On the 13th of May, 1903, the plaintiff amended his declaration, as heretofore stated, by adding Lucas Amadeo as a party plaintiff in the caption and averring in the body thereof that "after the fire in the year 1890 it (the policy) was sold by an order of court on an attachment writ of the court of the first instance of San Juan Cathedral district in a public auction to said Credito Mercantil, and that in the year 1896 said policy was acquired by purchase by Lucas Amadeo, one of the plaintiffs herein, of which he is now a part owner, subject to the Caja de Ahorros" (R., 27).

To the joining of Lucas Amadeo as a party plaintiff in the cause the defendant noted and was allowed an exception, and thereafter the case was put at issue (R., 29).

On the trial the plaintiff "at the beginning of said trial" offered the witness Antonio Amadeo, and "thereupon the defendant objected to the introduction of any testimony in this cause," because under the pleadings herein neither plaintiff has a cause of action or a right to recover against the defendant, and because, among other things, "the amendment made this day, introducing Lucas Amadeo as plaintiff, substitutes a new party and an entirely new cause of action,

and because the cause of action appears upon the face of the pleadings herein to be affirmatively barred by the statute of limitations or the law of prescription in force in Porto Rico; all of which objections were overruled by the court, and exception to such ruling was noted."

The witness Antonio Amadeo testified that the policy of insurance sued on "covering the stock of sugar and molasses in the warehouse of his estate "Quebrada Arenas" had been issued to him by the defendant company, and that "on the night of the 6th and 7th of February, 1885, the stock of sugar and molasses so insured and in the warehouse aforesaid was entirely destroyed by fire" (R., 59); that "he had given the policy of insurance sued on as collateral security to the Credito Mercantil" (R., 61); and "no evidence was offered by either party proving or tending to to prove any transfer of the policy sued on or the proceeds thereunder by or from the Credito Mercantil to either of the plaintiffs in this case" (R., 76).

But even if it had appeared that a valid transfer of the interests of the Credito Mercantil in the policy had been made to Lucas Amadeo it would still remain to be considered whether either the Credito Mercantil or its assignee could have maintained an action upon the policy itself without first showing that the requirements of the Spanish civil law respecting pledges had been fully complied with.

By article 1857 of the Civil Code for many years and still in force in Porto Rico (War Department translation, 1899) it is declared that—

"The following are essential requisites of the contracts of pledge and mortgage:

"1. That they be constituted to secure the fulfillment of a principal obligation.

"2. That the thing pledged or mortgaged is owned by the person who pledges or mortgages it.

"3. That the persons who constitute the pledge or mort-

gage have the free disposition of their property, and, should they not have it, that they are legally authorized for the purpose."

By article 1858 "it is also essential in these contracts, that when the principal obligation is due, the things of which the pledge or mortgage consists may be alienated to pay the creditor."

By article 1859 "a creditor cannot appropriate to himself the things given in pledge or mortgage, nor dispose of them."

Article 1863 declares that "besides the requisites mentioned in article 1857 it is necessary, in order to constitute the contract of pledge, that the pledge should be placed in possession of the creditor or of a third person by common consent."

Article 1864: "All personal property which is the object of commerce may be given as a pledge, provided it be capable of being possessed."

Article 1865: "A pledge shall not be effective against a third person when evidence of its debt does not appear in a public instrument."

In the absence of any pledge of the stock of sugar and molasses itself upon which the insurance policy was founded it would seem that the attempt to transfer a conditional right of action by pledging the insurance policy alone, which was without value except in case of a loss, was not within the contemplation of the Civil Code. This suggestion is strengthened by the analogy afforded by the mortgage law. (See sec. 1877 of the Civil Code.)

If such assignment of the *chose in action* is supposed to have taken place, it does not appear to have been evidenced by a public instrument, and under the provisions above quoted it would be without validity as against the obligor company here attempted to be held thereby.

It clearly appears from the foregoing that no cause of action in behalf of the plaintiff, Lucas Amadeo, was established either by the pleadings or the proofs, and it is equally clear that it was reversible error on the part of the trial judge to decline to instruct the jury to return a verdict in favor of the defendant, in so far, at least, as the claim of Lucas Amadeo was concerned.

At common law a policy of insurance against fire is not assignable in any such sense as to give the assignee a right to sue in his own name. By an assignment of an insurance policy the assignee acquires merely a *chose in action*, giving to the holder at most an equitable claim, which he can assert and enforce only in the name of the assignor. (May on Insurance, vol. 2, sec. 377.)

There is no reason to suppose that the civil law is otherwise.

(*d.*) In view of what has already been said, it would seem to be useless to discuss the question as to whether the "incompatible" claims or actions of the two plaintiffs could be consolidated in the one suit. Though such claims arise out of the same cause of action, viz., the policy of fire insurance, nevertheless the claims of the plaintiffs are antagonistic to each other, and a recovery in favor of one would effectually bar the alleged right of the other. The pleadings cannot support a joint judgment in favor of both.

The consolidation of the action of Lucas Amadeo with that of Robert Miller, as special master, was made on the day of the trial and after answer had been made by the defendant. Such procedure is forbidden by the Code of Civil Procedure of Porto Rico, article 157, as follows:

"The consolidation of actions shall not be permitted after an answer to the complaint has been made, but the plaintiff reserves the right to institute the proper independent actions."

Section 914 of the Revised Statutes, United States, provides that:.

"The practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Section 34 of the Foraker act (April 12, 1900) provides that the district courts of the United States for Porto Rico shall have, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, *and shall proceed therein in the same manner as a circuit court.*"

The action of the trial court in permitting the amendment of the declaration so as to include therein a new party plaintiff and a new cause of action in favor of such plaintiff was contrary to the procedure established by law "in like causes in the courts of record" of the island of Porto Rico, and hence was contrary to the express law of the United States on the subject. The objection of the defendant in such connection should have been sustained, and the refusal of the court so to do must constitute reversible error.

(c.) If any cause of action is disclosed by the pleadings or made out by the proofs, then it is barred by prescription.

The prescription of actions upon fire insurance policies is controlled by the provisions of the Code of Commerce in force in Porto Rico at the time of the trial. Such Code had been in force in said island since May, 1886 (War Dept. Trans., 1899, p. 5).

The articles of the Code of Commerce applicable to the pending matter are as follows:

"Art. 2. Commercial transactions, be they executed by merchants or not, whether they are specified in this Code or not, shall be governed by the provisions contained in the same; in the absence of which, by the commercial customs generally observed in each place; and in the absence of both, by those of the common law.

"Commercial transactions shall be considered those embraced in this Code and any others of a similar character."

"Art. 380. An insurance contract shall be commercial if the underwriter is a merchant and the contract is at a fixed premium, or when the insured pays only a single and constant amount as the price or compensation for the insurance."

"Art. 386. All personal or real property which is liable to be destroyed or injured by fire may be the subject of an insurance contract against fire."

"Art. 388. In contracts of insurance against fire, in order that the underwriter be obligated, he must have received the single premium agreed upon or the partial ones at the period fixed.

"The insurance premiums shall be paid in advance, and the payments shall bind the underwriter, no matter what may be the duration of the insurance."

"Art. 942. The periods fixed in this Code for bringing the actions arising from commercial contracts cannot be extended and are without recourse.

"Art. 943. The actions which by virtue of this Code do not have a fixed period in which to be brought judicially shall be governed by the provisions of the common law, *i. e.*, by the Derecho Comum, or Civil Code."

As no period is fixed by the Commercial Code for the institution of actions upon insurance policies, the provisions of the Civil Code pertain, article 1961 of which declares that "actions are prescribed by the mere lapse of time specified by law."

Article 1964. "A mortgage action prescribes after twenty years, and those which are personal and for which no special term of prescription is fixed, after fifteen years."

Article 1969. "The time for the prescription of all kinds of actions when there is no special provision to the contrary, shall be counted from the day on which they could have been instituted."

The action in the case at bar being upon the insurance policy "for which no special term of prescription is fixed," it is by virtue of articles 1964 and 1969 of the Civil Code barred after the lapse of fifteen years from the day on which it could have been instituted.

The loss occurred on the night of the 6–7 of February, 1885 (R., 6). Action could have been brought to recover therefor the next day.

The fifteen years' period "from the day on which action could have been instituted" expired February 8, 1900.

Action on behalf of Miller was commenced April 23, 1902 (R., 1), and on behalf of Lucas Amadeo May 13, 1903 (R., 27).

Both actions were clearly barred by the lapse of time unless the prescription was interrupted.

Article 582 of the Code of Commerce of 1868, which was in force at the time the policy of insurance was executed and the loss occurred, was as follows:

"Prescription is interrupted by suit or any other character of judicial interpelation made against the debtor, or by the renewal of the document upon which is founded the action of the creditor. In the first of these two cases the term of prescription will begin anew from the date that the last step was taken in the suit at the instance of either of the parties litigant; and, in the second, from the date of the new document; and if in the latter there should be postponed the time of compliance with the obligation, from the date that the latter should become due."

These provisions are substantially reproduced in article 944 of the Code of Commerce of 1886, above referred to, which was in force at the time of the trial.

"Art. 944. The prescription shall be interrupted through suit or any judicial proceeding brought against the debtor, through the acknowledgment of the obligations, or through the renewal of the instrument on which the right of the creditor is based.

"The prescription shall be considered uninterrupted by a judicial proceeding if the plaintiff should discontinue it, or the case should lapse, or his objection be disallowed.

"The period of the prescription shall begin to be counted again, in case of the acknowledgment of the obligations, from the day this is done; in case of their renewal, from the date of the new instrument, and if the period for meeting the obligation should have been extended, from the date this extension has fallen due."

Suit (Demanda) in the Spanish law means a petition to the judges asking that something may be paid, given or done to us (Escriche, Diccionario, &c., &c., p. 541).

"Judicial proceeding" (judicial interpelacion) is any demand for the payment of a debt or the fulfillment of an obligation made through suit or in the administration of justice.

This provision of the Code of Commerce differs materially from the provision of the Civil Code on like subject, which is as follows:

"Art. 1973. Prescription of action is interrupted by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgment of the debt by the debtor."

To interrupt prescription with respect to any debt or obligation controlled by the provisions of the Code of Commerce the demand or claim must have been asserted judicially—that is, through the courts or the judges; while with

respect to a claim or debt governed by the Civil Code the prescription may have been interrupted by a suit or by any claim made upon the creditor.

As a policy of fire insurance is a commercial obligation, actions to enforce its payments are governed by the restrictive terms of the Code of Commerce, and no verbal or nonjudicial written demand or claim made upon the company or any of its officers or agents will interrupt the prescription.

* * * "el único modo de interrumpir la prescripcion es la reconvención en juicio ó el emplazamiento, sin que valga alegar la peticion verbal in por carta particular" (Robles Pozo, Enjuiciamiento Civil, vol. 1, p. 456; Supreme Court of Madrid, sentence of October 3, 1884; see also Supreme Court of Madrid, sentence of November 5, 1880; Robles Pozo, *ib.*, p. 392; also Supreme Court of Madrid, No. 25, January 20, 1898).

It does not appear in the record of this case that any judicial proceeding had ever been taken by any person upon the policy in question prior to the institution of suit by Miller in April, 1902.

But if it should be insisted that under the Code of Commerce prescription could be interrupted by extrajudicial demand, then it was necessary at the trial for the plaintiff to prove such demand by some formal writing (Supreme Court of Madrid, No. 10, January 12, 1893; *ib.*, No. 157, November 24, 1896).

But it is suggested that both, under the Commercial and Civil Codes, prescription may be interrupted "through the acknowledgment of the obligations" or the debt, and so to avoid the plea of prescription the plaintiff called the insured, Antonio Amadeo, as a witness, and, although interruption of the prescription had not been pleaded, he was permitted over the objection of defendant, to testify to an alleged verbal offer made to him in May, 1887, when in New York,

by an insurance adjuster, Mr. Watlington, to pay $25,000 in settlement of all the policies held by him in both the Royal and Northern Companies.

The entire testimony relating to Mr. Watlington and his connection with the transaction is as follows:

By Antonio Amadeo:

"About two or three months after the fire an adjuster of the company named Mr. Watlington came down from New York; he was there taking measurements, making investigations and examining; I do not know what he did; he went away a few days afterwards, but he was there taking statements and investigations" (R., 60).

"A few months or a year after, or two years perhaps, I do not recollect the time well, I went to New York; I passed through New York and had a conversation with the adjuster, Mr. Watlington, in the house of Mr. Henry Beste, a merchant of New York.

"Q. You say that was about two years afterward?

"A. Yes.

"Q. That would have been in 1887, would it?

"A. Yes.

"Q. What month?

"A. In May.

"What happened?

"A. I had a conversation with Mr. Watlington in the office of Mr. Beste of New York. I was in the office of Mr. Beste with Mr. Watlington and Mr. Watlington after some discussion and talk offered me twenty-five thousand dollars in settlement of my policies of insurance.

"Q. Of all of your policies of insurance?

"A. Including all my policies belonging to him. I refused this offer" (R., 61).

To this testimony defendant objected on the ground that it had not been shown that at the time of the occurrence said Watlington was employed by the company or was authorized to represent or bind it in any way.

This objection was overruled and an exception noted (R., 61).

Witness Amadeo then testified that Mr. Beste sent for Mr. Watlington to get a settlement of the matter in his office, and Watlington offered him $25,000 for his policies.

This statement was also objected to upon the ground next above stated, and for the further reason that if made it was in connection with an effort to compromise the claim of the witness, who further testified that he held five policies of insurance upon the property at the time of the fire and his brother Federico held others (R., 62).

Watlington, called by the defendant, testified that about the year 1885 he had occasion to visit Porto Rico for the purpose of ascertaining and adjusting the loss under policies issued to Antonio José Amadeo and Federico Amadeo by the Royal Insurance Company and the Northern Assurance Company. "He went to Porto Rico at that time as a special agent in that case only;" the loss claimed under the policy here sued on was rejected (R., 71); at that time Feddersen & Company were the general agents of the company in Porto Rico and they remained there as such for several years thereafter. Witness saw Amadeo in New York in 1887; at which time witness was neither an employé, representative, or agent of the Royal Insurance Company. Witness told Amadeo he would suggest to the companies that they settle the losses at twenty-five thousand dollars (R., 72).

"Q. Did you have any authority at that time to act for the Royal Insurance Company? (R., 72).

"A. I did not. That twenty-five thousand dollars was to include all policies of both companies to both insured, and to cover the entire transaction.

"Q. How did you come to make such a suggestion as that?

"A. It was made of my own volition. I told Dr. Amadeo that I was not authorized to represent the companies, but that I would do all I could to bring about a settlement" (R., 73).

"Cross-examination:

"Q. You say that after you left Porto Rico you had no more connection with these companies?

"A. No, I did not say that; I have some connection with them now.

"Q. After that had you severed your connection with these companies so far as this case was concerned?

"A. I said that my authority had ceased. Feddersen & Company kept up a correspondence with me; I had no authority in the matter, but at the same time I was quite willing to give any information that I had to either party.

"Q. You mean to state that you had no authority to bind the company but that you still continued in the employ of the company so far as binding the insured was concerned?

"A. No sir, no such thing,—I bound nobody" (R., 73).

Witness kept up correspondence with Feddersen & Company about the matter to a limited extent for possibly "a year or two." "There was nothing binding on the companies; both companies had to be consulted and their consent obtained before anything would be binding on them" (R., 73).

"Q. Could you still have adjusted the claim?" (R., 73).

"A. No, I could not; I could have adjusted it if the company had affirmed what I did, but it required their affirmation.

"Q. Besides being the adjuster were you the agent of the company at the time for Porto Rico?

"A. Of course I was not the agent" (R., 74).

Upon this state of the evidence the defendant requested the trial judge to instruct the jury as follows:

(Assignment of error No. 3:)

"The court instructs the jury that if they believe from the evidence that at the time that Antonio J. Amadeo had the conversation with the witness Watlington in the office of Henry Beste in New York said witness was not an agent of or employed by the defendant company, then nothing that he may have said or done at that time could bind the defendant company" (R., 76).

In connection with this request for instruction and assignment of error is also to be considered the defendant's request for instruction No. 2, reading as follows:

"The court instructs the jury that unless you believe from the testimony that a suit has been brought against defendant company to recover on the policy herein within fifteen years after the fire occurred, or unless defendant company by an agent duly authorized acknowledged the claim in writing within such period of fifteen years, plaintiff cannot recover herein" (R., 77).

And his request No. 3, reading as follows:

"The court instructs the jury that unless a demand was made by Antonio Amadeo, or some one for him, upon the defendant company or upon some agent having authority to represent it, in the presence of witnesses called for that purpose, within fifteen years prior to the bringing of this suit on April 23d, 1902, plaintiff cannot recover" (R., 78).

The court refused to so instruct the jury, and, exceptions to such refusal having been noted, the court of its own motion instructed the jury as follows:

(Assignment of error No. 5:)

"There is testimony tending to show that in May, 1887, the insured, Antonio Amadeo, went to New York; that he there found the agent who had been sent to Porto Rico in 1885 to adjust this loss. There is testimony tending to show that he then demanded a settlement of that loss. There is testimony tending to show that at that time that agent who had come here to Porto Rico as an adjuster of that loss offered him in settlement of this policy and other policies upon that property the sum of twenty-five thousand dollars. Upon the other hand, it is said that there was not such an offer; that the party merely said to the insured, 'I will use my good offices in trying to get a settlement for twenty-five thousand dollars,' and it is stated that there was no offer of a certain sum in settlement of that loss. It is for you to determine, from all the evidence in the case, what actually occurred.

"I say to you, as a matter of law, that if the company sent

a man to Porto Rico in 1885 to settle this loss, with general power to adjust and settle it, although his power only applied to this loss, that then, unless the insured, Antonio Amadeo, had notice that his agency as to that loss had ceased, or that it had been restricted in some way, or had ended, he had the right in law, and the company, as a matter of law, were still holding him out to the insured as the adjuster to settle that loss,—the insured had a right, in law, to apply to that adjuster and demand of him a settlement of that loss. If it be true, as is contended by the one side, that at that time that party made an offer absolutely and unconditionally of so much in settlement of this and other policies, that would cut off for the time and stop the running of the statute of limitations, and his action, if the company had given no notice to the insured that the adjuster's agency had ended, cut off the running of the statute of limitations, and you will readily see that from May, 1887, until the time this action was brought is not a period of fifteen years, and therefore the limitation will not apply.

"Upon the other hand, if you believe from the testimony that the insured was either notified at that time that that party who had been the adjuster was no longer the adjuster and had no power to act, then that offer was not binding on the company; or, if you believe from the testimony that the offer of so much in settlement was not made at that time, and that it was only an offer on the part of the party to do what he could to bring about a settlement, he merely acted as a friend or intermediary, then it would have no operation in suspension of the statute" (R., 80–81).

No evidence tending to prove the existence of a written power of attorney from the defendant company to the adjuster Watlington was offered by either party, and the only testimony concerning the fact of his agency was that of Watlington himself, who testified that he went to Porto Rico in 1885, on behalf of the Royal and the Northern Companies, for the purpose of ascertaining and adjusting the losses under the various Amadeo policies; that he went there "as a special agent in that case only;" that he then rejected the loss claimed under the policy in suit; that in 1887, when he saw Antonio Amadeo in New York, he was neither an em-

ployee, representative, nor agent of the Royal Insurance Company and had no authority to act for it. Notwithstanding this uncontradicted evidence, the trial judge charged the jury that "if the company sent a man to Porto Rico in 1885 to settle this loss, *with general power to adjust and settle it*,—there being no testimony that Watlington had any power *to settle the loss*,—then *unless the insured had notice that his agency as to that loss had ceased*, or that it had been restricted in some way, or had ended, he *had the right in law*, and *the company, as a matter of law, were still holding him out to the insured as the adjuster to settle that loss*" * * * and if Watlington "made an offer absolutely and unconditionally of so much in settlement of this and other policies *that would cut off for the time and stop the running of the statute of limitations*, and *his action, if the company had given no notice to the insured that the adjuster's agency had ended, cut off the running of the statute of limitations.*"

It would be difficult to compress more of error in such short space than is disclosed by the instructions quoted. It is assumed, without proof, that the authority to "ascertain and adjust the loss" included authority "to settle" the loss adjusted; and the jury is charged that notwithstanding the loss claimed was absolutely rejected, and the insured so informed by the adjuster, nevertheless, in the absence of an express notice from the insurer to the insured that the adjuster was without further power in the premises, said adjuster possessed the authority and power after the lapse of two or more years to change his mind, and to acknowledge an obligation on the part of the insurer in favor of the insured and his assignees or privies so as to interrupt prescription.

This is clearly contrary to the settled doctrines of the American law of agency, a cardinal principle of which is that the declarations or admissions of an alleged agent cannot be given in evidence to charge the principal until it first has been shown that he was agent, and that the scope of his general authority embraced the subject spoken of; an

agent of limited powers cannot bind his principal when he transcends his powers, and all persons doing business with an agent are bound to know the extent of his authority; an authority to make an admission is not necessarily to be implied from an authority previously given in respect to the thing to which the admission relates (1 Greenleaf, p. 114), and all evidence of declarations by an agent as to past transactions of his principal are inadmissible as mere hearsay (Northern Pacific R. R. Co. *vs.* Paine, 119 U. S., 551, 560).

The rule is settled that admissions by an agent can only bind the principal when

(1) the agent is specially authorized to make the admission; or

(2) the agent's admission is of a *present* fact and part of the *res gestæ*; or

(3) the agency is general, having full and complete charge of the business of the principal and the admission was made in the ordinary course of business.

The civil law is not otherwise.

The civil code in force in Porto Rico during the time of the occurrences involved in this cause contained, among many other clauses not important here, the following:

Title II, Contracts, Chapter 1.

Art. 1259. No one can contract in the name of another without being authorized by him or without having his legal representation according to law.

Chapter 3. Effectiveness of Contracts.

Art. 1278. Contracts shall be binding, whatever may be the form in which they have been executed, provided the essential conditions required for their validity exist.

Art. 1279. Should the law require the execution of an instrument or other special formality in order to make the obligations of a contract binding, the contracting parties may compel each other to comply with said formalities from

the moment in which consent and the other requirements, necessary for their validity, have taken place.

Art. 1280. The following must appear in a public instrument:

* * * * * * *

5. * * * the power to administer property and any other (power), the object of which is an act drafted or which is to be drafted in a public instrument, or which may prejudice a third person.

6. The assignment of actions or rights arising from an act contained in a public instrument.

All other contracts, in which the amount of the presentations of one of the two contracting parties exceeds 1,500 pesetas, must be reduced to writing, even though it be private.

The same code, under "Title IX, Agency," chapter 1, subtitle "Character, form, and kinds of agency," defines an agent as follows:

Art. 1709. By the contract of agency, a person binds himself to render some service or to do something for the account or at the request of another.

Art. 1710. An agency may be express or implied. An express agency may be given by a public or private instrument or even by parol.

The acceptance may also be express or implied, the latter being inferred from the acts of the agent.

Art. 1712. Agency is general or special. The former includes all the business of the principal. The latter, one or more specific transactions.

Art. 1713. An agency stated in general terms only includes acts of administration.

In order to compromise, alienate, mortgage, or to execute any other act of strict ownership an express commission is required.

Art. 1714. An agent cannot exceed the scope of his authority.

Art. 1715. The scope of the authority shall not be considered as exceeded if it should be fulfilled in a manner more advantageous for the principal than that specified by him.

Art. 1717. When an agent acts in his own name, the principal shall have no action against the persons with whom the agent has contracted, nor the said persons against the principal.

In such case, the agent is directly liable to the person with whom he has contracted, as if the transaction were his own. The case involving things belonging to the principal is excepted.

Chapter 2, Obligations of the Agent.

Art. 1719. In complying with the agency, the agent shall follow the instructions of the principal. In their absence, he shall do all that which, according to the character of the business, would be done by a good father of a family.

Chapter 3, Obligations of the Principal.

Art. 1727. A principal must fulfill all the obligations which the agent may have contracted, within the scope of his authority.

A principal is liable, in so far as the agent has exceeded his power, only when he ratifies the same, expressly or in an implied manner.

Chapter 4, Manner of Terminating the Agency.

Art. 1732. Agency is terminated: (1) By revocation. (2) By withdrawal of the agent. (3) By death, interdiction, bankruptcy, or insolvency of the principal or of the agent.

Art. 1733. The principal may, at his will, revoke the power and compel the agent to return the instrument containing the same in which the authority was given.

Art. 1734. If the agency should have been granted to contract with determined persons, its revocation cannot prejudice them unless they were given notice.

Title XIII, "Compromises and arbitrations," Chapter 1, "Compromises," declares:

Art. 1809. A compromise is a contract by which each of the parties in interest, by giving, promising, or retaining

something, avoids the provocation of a suit, or terminates one that has already been instituted.

Art. 1812. Corporations which have a judicial personality may only make compromises in the manner and with the requisites necessary to alienate their property.

The Commercial Code, title II, "Commercial Registries," provides:

Art. 16. A commercial registry shall be opened in all the capitals of the provinces, composed of two independent books, in which shall be recorded (1) private merchants and (2) associations.

Art. 21. On the sheet record of each merchant or association there shall be entered * * *

"6. General powers of attorney, and revocations of the same, should there be any, given to managing partners, factors, employees, *and any other agents.*"

Title III, "Commercial commissions," subtitle "Agents," declares—

Art. 244. A commercial commission shall be considered that which involves a commercial act or transaction *and* in which the principal or the agent is a merchant or commercial broker.

By an opinion of September 21, 1896, the supreme court of Madrid declared that to constitute one an agent to transact commercial business a solemn instrument in writing was not necessary, but such a commission may be authorized in writing or by word, *although in the latter case*, as was declared by the later opinion of January 17, 1873, "*it will be necessary to ratify it in writing*" (War Dept. Trans. Com'l Code, p. 68).

Art. 246. When the agent transacts business in his own name, it shall not be necessary for him to state who is the principal and he shall be directly liable, as if the business were for his own account, to the persons with whom he transacts the same, said persons not having any right of action against the principal, nor the latter against the former, the

liabilities of the principal and of the agent to each other always being reserved.

Art. 247. If the agent transacts business in the name of the principal, he must state that fact; and if the contract is in writing, he must state it therein or in the subscribing clause, giving the name, surname, and domicile of said principal.

In the case prescribed in the foregoing article, the contract and the actions arising therefrom shall be effective between the principal and the person or persons who may have transacted business with the agent; but the latter shall be liable to the persons with whom he transacted business during the time he does not prove the commission, if the principal should deny it, without prejudice to the obligation and proper actions between the principal and agent.

Art. 279. The principal may revoke the commission entrusted to an agent at any stage of the transaction, advising him thereof, but always being liable for the result of the transactions which took place before the latter was informed of the revocation.

The witness Ardran, auditor of foreign claims for the defendant, who states that he knew the facts and circumstances connected with the claims growing out of the Amadeo policies, testified that the defendant company has never admitted its liability for the loss alleged to have been suffered under the policy in suit and never acknowledged or agreed to pay to the plaintiff or any person claiming to own said policy the amount thereof on account of said loss (R., 65).

Feddersen, Willnick & Co. were general agents of the company in Porto Rico from January 15, 1880, to February 15, 1884, and Feddersen & Co. were such from February 15, 1884, to May, 1889. The company had no other agents in Porto Rico during such years than the firms named (R., 67).

In order to justify the instruction of the trial judge, to the effect that unless the insured Amadeo had notice that the adjuster Wallington's agency as to that loss had ceased or been restricted in some way, the company, as matter of law, were still holding him out to the insured as the adjuster to settle

that loss, it should first have appeared in evidence that Wallington had been formally commissioned by the company *to settle* the loss, and that his power of attorney remained upon the commercial registry unrevoked.

In view of the law of Porto Rico as to the appointment of commercial agents and the public registration of their powers of attorney, it is plain that the attempt on the part of the plaintiff to prove by the witness Amadeo that in a conversation held more than two years after the loss occurred with Duplace, a deceased partner of the house of Feddersen & Co., the latter told him that Feddersen & Co. were then no longer the representatives of the company (R., 60).

In the absence of express proof of the fact it is not to be assumed that an insurance adjuster is authorized, within the territory of a general agent, to settle and pay losses. His business is to ascertain the truth as to the alleged loss, not to pay it. It will be noted that at best the alleged offer of Wallington's was a proposition of compromise, that is to say, $25,000 in full settlement of $51,400, face value of policies (R., 70). Assuming such a proposition was made as testified by Amadeo, nevertheless before it could operate to the "prejudice of a third person," *i. e.*, the insurance company, the power of the alleged agent Wallington to make it must have been made to "appear in a public instrument" (Civil Code, art. 1280).

Had Wallington's alleged offer as made been accepted by Amadeo, instead of rejected, as the latter testifies it was, still it would have had no binding force whatever upon the company, for article 1812 of the Civil Code declares that "corporations which have a judicial personality may only make compromises in the manner and with the requisites necessary to alienate their property" (*ante*)—that is, by public instrument.

But if Wallington had been fully authorized by power of attorney at the date of the alleged demand and offer of set-

tlement, still his alleged offer as made would not have been sufficient to interrupt prescription, for at most it was an offer of compromise, an offer to give something "to avoid the provocation of a suit" (Civil Code, art. 1809), and was not a recognition of the debt or obligation; and while an acknowledgment (of the debt) which will serve to interrupt the prescription may be express or implied, and in the former case is not to be confined to any special form, but may be found in a simple letter or may rest in spoken words alone, and in the latter it may arise from any act which implies recognition of the right in the creditor or possessor such as the payment of a part of the debt or the interest or arrearages or even a request for delay, and also results from written offers (d'offres réeles) or even from verbal offers not accepted, nevertheless, it is always to be premised that such offers *have been made without conditions and not in the way of a compromise. Sicuti.* Elle peut également résulter d'offres réeles ou même d'offres verbales non acceptées, pourver que les nues ou les autres aient été faites purement et simplement et non à titre de transaction (Aubry & Rau, Droit Civil Français, ome 2, § 215, p. 355).

And so it seems that in the French law the creditor who pretends that the prescription has been interrupted by verbal acknowledgment or by the payment of interest or of arrearages is not permitted to prove such acts by witnesses whenever the principal of the debt or the capital of the interest (rente) exceeds 150 francs (*ib.*, p. 356; Baudry-Lacantinerie, Precis de Droit Civil, tome 3, §§ 1647, 1648, p. 999).

It was not made to appear at any stage of the trial that Watlington had any authority to make admissions of any sort on behalf of the company, certainly not so far as past events were concerned; he occupied no such relation to the goods (biens) that is the capital of the insurance policy as would authorize him to recognize any right in the demandant so as to interrupt the prescription, for he neither had possession of the *biens* nor the right to their possession nor to their administration.

In this connection there is another point of equal consequence and interest. The plaintiff, Miller, claims his right to prosecute this action by virtue of an alleged hypothecation of the insured's interest in the policy made September 19, 1884, four days after the date of the policy itself.

The loss occurred February 6, 1885, and the alleged verbal demand of Amadeo and verbal offer of compromise relied upon to interrupt the prescription occurred, if at all, in May, 1887. If Miller is entitled to maintain this suit today by virtue of the above mortgage, it is clear that Amadeo had no interest in the policy in 1887, and any demand by him and admissions by Watlington were not by or to the creditor who was in the way of being prescribed.

The Spanish law upon this point is plain and may be stated as follows:

In order that the period provided by law for the prescription of actions may be held to have been interrupted it is necessary that some obstructing act be done on the part of the person who exercises the action, for such person shall not take advantage of acts done by some other person (Decision Sup. Ct. Madrid, cited in Derecho Procesal de España, by Robles Pozo, vol. 2, p. 248).

The testimony of Battistini tending to show that in 1898 he went to the office of the company at Liverpool "and asked them if they would pay the policy sued on or come to some settlement" (R., 63), even if the same was admissible in evidence and free from objections on other grounds, would not serve to advance the case of either plaintiff, for it is clear no acknowledgment of the debt or any obligation on account of the policy was made to him by the company or any one supposed to be acting for it. Battistini's account of what transpired is as follows:

"He saw the secretary of the defendant company who told him that he did not want to hear anything about the policy, and declined to hear or propose any arrangement of

settlement; nothing else was said about the policy and he was the only man connected with the company that witness saw in connection with collecting the policy. The company absolutely refused to speak any more about the matter' (R., 63).

How this testimony could be tortured into such an acknowledgment of obligation as would serve to interrupt prescription of action upon the policy is impossible of conception.

The witness did not claim to have been acting on behalf of the insured, Don Antonio, but says he went to the office of the company at Liverpool and asked them if they would pay the policy sued on as a "piece of business that I [he] made with Lucas Amadeo, the brother of Don Antonio" (R. 63).

As it has already appeared that Lucas Amadeo, at least in so far as disclosed by this record, had and has no interest in the policy or its proceeds (*ante*, p. 44, *et seq.*, *b* and *c*). No demand made by or acknowledgment made to Battistini acting as his agent could have the slightest effect in this cause.

Notwithstanding the express testimony of Battistini himself that the company acting through its secretary "declined to hear or propose any arrangement of settlement," and that "nothing else was said about the policy" by said secretary or anyone else connected with the company, nevertheless the trial court over the objection and exception of the defendant (R., 85) charged the jury:

"If you believe from the testimony that this party, Battistini, acting for the insured and for Lucas Amadeo, went to Liverpool and demanded payment of this claim, *and there was an offer to pay or an agreement to pay a certain sum on it*, then that would stop the running of the statute of limitations and would cut off the time.

"Even if there had existed no such state of case as I have named to you between the agent of the company who came to Porto Rico to adjust this loss and Amadeo in the month of May, 1887, in New York, *even if that had not occurred then*

this would stop the running of the statute of limitations, if there was not only a demand of payment but an offer of payment" (R., 81).

As this instruction was not only without support in the evidence, but was flatly opposed to the only testimony given at the trial on the subject, it is clearly erroneous. Interwoven as it is with other points covered by the court's charge, it is impossible to say what and how much or how little damage was wrought to the defendant by it. Even if the balance of the court's charge, instead of being heavily freighted with error, was entirely free therefrom, nevertheless, for this error alone, so gross and so palpable is it, the judgment complained of should be reversed.

To argue at greater length the assignments of error numbered 4, 5, and 6 would unduly and unnecessarily expand the already too great proportions of this brief. In every essential phase each one has been already covered. To apply to the specific clauses of each of these assignments the law of the case as it should have been administered by the trial court would be but to repeat in varying forms the arguments already submitted.

The judgment of the district court for Porto Rico in this cause should be reversed, with costs, and if this court should be of opinion that neither of the plaintiffs below has established the right to maintain this action against the defendant the cause should be remanded, with instructions to the lower court to sustain a demurrer to the amended declaration.

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OCT 30 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 7.

ROYAL INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT MILLER, SPECIAL MASTER OF THE CAJA DE AHORROS, AND LUCAS AMADEO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

1.

Defendant in error contends that, irrespective of any error that may have been committed by the trial court in connection with the admission of evidence tending to show an interruption of the claimed prescription of fifteen years and the instructions to the jury thereabouts, the judgment of the trial court should be affirmed, because the true period of prescription provided for such cases by the Spanish law in force in Porto Rico was twenty years, and, that period of time not having elapsed between the date of the fire and the institution

of the suit, the errors above specified were necessarily harmless But error presupposes prejudice, and it is incumbent upon the party claiming an affirmance upon a ground other than that taken at the trial to show beyond doubt that the opposing party could and would suffer no prejudice by such a disposition of the matter.

In Peck *vs.* Heurich (167 U. S., 624), which came before this court on writ of error to the Court of Appeals of the District of Columbia to review a judgment of that court affirming a judgment of the supreme court of the District of Columbia in favor of the defendant Heurich in an action of ejectment brought by Peck and another to recover certain lands, Mr. Justice Gray, speaking for the court, said:

"One ground taken in the opinion of the Court of Appeals and at the argument in this court, in support of the judgment for the defendant was that independently of the question of the validity of the deeds to the plaintiffs, they could not maintain this action, because they had not complied with the rule of law of Maryland, in force in the District of Columbia, by which, in order to maintain an action of ejectment, the plaintiff must show that he has the legal title in the land and the right of possession, and cannot establish this without first showing that the land had been granted by the State, unless both parties are shown to claim title from the same source.

"But this ground is not open to the defendant upon the record. No such objection to the introduction of the deed in evidence was made at the trial. * * *

"*A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error* (Deery *v.* Cray, 5 Wall., 795, 808; Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S., 99, 103; Jones *v.* Sisson, 6 Gray, 288; Jones *v.* Wolcott, 15 Gray, 541)."

To these citations should also be added that of United States *vs.* Gentry, 119 Fed. Rep., 76, wherein it was declared

that error must be presumed to have been prejudicial and cannot be disregarded unless shown not to have been so.

In the case at bar, in addition to the plea of the general issue, the defendant also pleaded—

That the plaintiff ought not to recover—

(1.) Because the insured had materially misdescribed the property insured and the building in which it was situated; and

(2.) Because after the policy was issued the insured had materially increased the risk without the knowledge of the insurer by the introduction of operations, business, and goods which were hazardous (R., 21); and

(3.) Because neither the insured nor any one else within fifteen days after the happening of the alleged damage by fire delivered as particular an account as was reasonably practical of the articles alleged to have been damaged or destroyed by the fire, with vouchers and proofs or other evidence in support thereof, as was required by the conditions of the policy (R., 22).

Relying upon the course of the trial and the rulings of the trial judge with respect to the application of the prescription of fifteen years and the admissibility of plaintiff's evidence to show an interruption thereof, defendant did not introduce evidence in support of pleas numbered 1 and 2, but it is not to be presumed that had the course of the trial been otherwise he would have been unable to have done so. Defendant elected to rely upon and introduce evidence under plea number 3, and the evidence so introduced the trial judge saw fit to exclude from the consideration of the jury, that is to say:

On the trial the insured, Amadeo, was permitted to testify

that he notified the company's agents the next morning after the fire; that "a commission came from San Juan, sent by the general agents, Feddersen & Company, who made inventories and carried everything with them to San Juan; * * * they took notes and made inventories and investigations about the loss of the fire; they made all of these documents and put them in (R., 59) a sack and carried them to Feddersen & Company," &c., &c. (R., 60).

To overcome this testimony the defendant offered in evidence the deposition of Herbert Stanley Ardran, the auditor of foreign claims in the foreign department of the defendant company, who, after first stating that he had knowledge of the facts and circumstances connected with this claim, in response to certain written interrogatories propounded to him answered as follows:

Int. No. 6. Please state the reasons why defendant company has refused and still refuses to pay the alleged loss growing out of the said policy of insurance above described?

Ans. * * * Second, that no such claim or account as is required by the sixth condition of the policy was delivered to the company within fifteen days or at all and that condition has not been complied with (R., 65).

Int. No. 12. State whether the then holder of the said policy or any one for him then or at any time since has complied with the conditions of the policy and the directions given by your company as aforesaid in the matter of presenting proper proofs of loss.

Ans. No.

Int. No. 13. State if defendant company has at any time since the said fire released the holder of said policy from complying with such conditions as to proofs of loss or has waived the same in writing or otherwise.

Ans. No.

Int. No. 15. State if there has been furnished to the company since the said fire, in writing and within the fifteen days thereafter, as particular an account as may be reasonably practical of the several articles or matters damaged

or destroyed by the fire and also of all other articles and matters insured by said policy with the estimated cash value of each of them respectively at the time of the fire and also of the nature and amount of the loss or damage occasioned to each or any of the said articles or matters and of the interest of the assured therein and in support thereof; whether there has been given all such vouchers, proofs and explanations as were required by the defendant company.

Ans. No, not at any time.

Int. No. 16. State whether any such claim was made within three months after the fire.

Ans. No (R., 66).

Each of the foregoing interrogatories and the answers thereto were, by the court of its own motion, stricken out of the deposition and permission to read the same to the jury was refused (R., 63), to which action of the court attorneys for defendants objected "for the reason that no exceptions to such depositions had been filed by the plaintiffs, and because the parts of said depositions so stricken out were material, relevant and competent testimony on behalf of defendants." These objections, however, were overruled, and to the action of the court exceptions were duly noted (R., 70).

The court charged the jury that "the defenses presented are (1) that there was a failure to furnish proofs of loss according to the terms and conditions of the policy; (2) that the action which was brought on April 23, 1902, is barred by limitation and the lapse of time, and (3) that the insured caused or procured or instigated the loss himself and therefore there can be no recovery."

The court further charged the jury with particular reference to the requirements of the sixth clause of the conditions of the insurance policy, as appears on page 78 of the record. To that clause the interrogatories and answers

above quoted were especially directed, and the responses of the witness were clearly competent and properly should have been admitted in evidence thereabouts. Whether the fifteen or the twenty year period of prescription be held applicable to this cause the error of the trial court in refusing to permit the above questions and answers to be read to the jury was material, but the error became of less import in view of the course which the case took when the trial court held the fifteen year period to be the true period of prescription and permitted what the defendants contend was inadmissible evidence to be introduced in support of the alleged interruption of such prescription.

Relying upon the errors committed on this branch of the case, defendants' counsel properly omitted from the assignments of error set out in the record any reference to refusal on the part of the court to admit in evidence the testimony above quoted, but if, as is now contended, the judgment of the court below should be sustained upon a different period of prescription from that applied by that court it must be plain to all that the refusal to submit this testimony to the consideration of the jury, going as it did to the very merits of the controversy, was necessarily prejudicial to the defendants, and necessitates in any view under the authorities above cited a reversal of the judgment.

2.

Plaintiff contends that there was no error in permitting Lucas Amadeo to be added as a party plaintiff, and that said Lucas Amadeo was entitled to recover upon the policy, although "no evidence was offered by either party proving

or tending to prove any transfer of the policy sued or the proceeds thereunder by or from the Crédito Mercantil to either of the plaintiffs in this case" (R., 76).

The policy in suit recites (R., 49) "that Antonio Amadeo * * * having paid * * * the sum of twenty pounds sterling for insuring against loss or damage by fire * * * the property hereinafter described, * * * viz: say sixteen hundred pounds sterling, on stock of sugar and molasses deposited in the sugar manufactory on the estate 'Quebrada Arenas' * * * 'The company hereby agree with the insured (subject to the conditions on the back hereof which are to be taken as part of this policy) that if the property above described or any part thereof shall be destroyed or damaged by fire * * * the company will * * * pay or make good to the insured the value of the property so destroyed or the amount of such damage thereto to an amount * * * not exceeding in the whole the sum of sixteen hundred pounds sterling * * *'" (R., 50).

It is provided by the 5th condition of the policy that "this policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person, otherwise than by will or operation of law, unless notice thereof be given to the company, and the subsistence of the insurance in favor of such other person be declared by a memorandum endorsed hereon by or on behalf of the company."

By its amended plea the defendant company averred that the insured, Antonio Amadeo, had assigned, transferred, pledged, and hypothecated to the Crédito Mercantil the policy in question, and that pursuant to certain judicial proceedings "the said policy was sold at public auction, and

thereafter was adjudicated and awarded to the said Crédito Mercantil, as aforesaid, which said adjudication was made in the said court aforesaid on the 6th day of August, 1891," and "that no transfer or assignment of the rights or interest in (of) the said Crédito Mercantil in and to such policy of insurance or the loss thereunder has ever been had or made" to the plaintiff Miller or the Caja de Ahorros (R., 24, 25).

Subsequently the plaintiff Miller, by leave of court, amended his petition by averring that the policy of insurance was given by the insured, Amadeo, to the Crédito Mercantil as collateral security for a loan, and that "after the fire in the year 1890 it was sold by an order of court on an attachment writ * * * to said Crédito Mercantil, and *that afterwards in the year 1896 said policy was acquired by purchase by Lucas Amadeo, one of the plaintiffs herein, of which he is now a part owner subject to the mortgage of the insured to the Caja de Ahorros*" (R., 27).

To the ruling of the court allowing Lucas Amadeo to be made a party plaintiff in the cause the defendant was allowed an exception (R., 29), but the defendant in error now contends that, as the defendant did not plead to the amended complaint, it admitted the allegations contained therein, and that (Brief Defendant in Error, p. 27) "no testimony was given by the plaintiff below on the point of the title of Lucas Amadeo to a share in the insurance money, as the title of Lucas Amadeo was admitted by the defendant by its not pleading to the amended complaint." Wherefore (Brief, p. 28) it was not necessary for the plaintiff below to prove that "said policy was acquired by purchase by Lucas Amadeo," or to prove "notice, registry or the proper delivery of the security."

As showing that the defendant company had notice of the transaction between Antonio Amadeo and the Crédito Mercantil, the defendant in error quotes in his brief (p. 29) from the deposition of the defendant's witness Ardran an admission by the latter of the receipt by the defendant company, under date of April 10, 1897, of a letter from the director of the Crédito Mercantil, stating that Amadeo had deposited the policy in question "in my company in guaranty of a business transaction with the bank," but he studiously omits to quote from the same deposition the further statements that under date of August 15, 1886, and September 29, 1888, and September 10, 1891, and May 6, 1901, said defendant company had received notices in writing from the insured, Antonio Amadeo himself, to the effect that no one other than himself had power to represent him or settle with the companies concerning the loss covered by the policy in suit, among others the last-mentioned notice, namely, that of May 6, 1901, containing the further notification that said insured, Antonio Amadeo, "had commenced suit before the Federal court of the United States for the island of Porto Rico" upon the policy referred to.

It is true that the trial judge struck from the deposition the above statements and all reference thereto, and refused to permit the same to go to the jury, but, as counsel for the plaintiff in error has seen fit to make use of a portion of the rejected testimony, he cannot complain that like use is made herein of other portions thereof.

It is true, as stated, that to the amended declaration the defendant did not plead *de novo*, but the consequences contended for by the defendant in error do not follow, for it is the accepted rule of practice in the courts of this country

administering the common law—and no different rule of practice is shown to prevail in the district of Porto Rico—that upon an amendment being made to a declaration the defendant has the right to plead *de novo*, not that he must so plead or judgment be entered by default or otherwise against him for want of such plea, if prior to the amendment he had already pleaded the general issue to the original declaration. As was said in *Wright vs. Hollingsworth*, 1 Peters, 165, 169, "we think the practice is well settled to the contrary. The defendant has a right, if he will, to withdraw his former plea and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo*. His failure to plead, and going to trial, without objection, are held to be a waiver of his right to plead, and an election to abide by his plea, and if it, in terms, purports to go to the whole action, as is the case in this instance, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new as well as the old counts. This is the general doctrine in other forms of action, such as trespass and *assumpsit*; and we see no reason to distinguish the action of ejectment, or take it out of the general rule."

To like effect are:

Power *vs.* Ivie, 7 Leigh (Va.), 147.
Kennedy *vs.* Dear, 4 Port. (Ala.), 423.
Topeka *vs.* Sherwood, 39 Kans., 690.
Robinson *vs.* Williamson, 7 Bush. (Ky.), 604.

The defendant relied for defense to the amended declaration upon his original plea of the general issue and the pre-

scription of fifteen years. Both of these pleas made it incumbent upon the plaintiffs to establish their right to maintain the action by proofs, and this presupposes the introduction of proof of title to or the acquisition of some other right or interest in or under the policy sufficient to permit the parties suing to maintain the action.

It is to be borne in mind that no assignment of the policy sued upon either to the Caja de Ahorros or to the Credito Mercantil was endorsed upon the policy, and that no assent to any such assignment of the policy or any interest therein was given by the defendant company. The policy, by its terms, provided that the insurance should cease to be in force as to any of the property insured which should pass from the insured to any other person otherwise than by will or operation of law.

It seems to be established law that, unless otherwise expressly stipulated, a policy of insurance does not run with the subject-matter of the insurance. A contract of insurance does not affect insurance of the specific property without regard to its ownership, but is a special agreement of indemnity with the person insured; and so, in the absence of an assignment, the holder of a policy cannot recover thereon because the insurer has not contracted with him (Columbia Ins. Co. *vs.* Lawrence, 10 Peters, 507; Carpenter *vs.* Providence Washington Ins. Co., 16 Peters, 495; Martin *vs.* Royal Ins. Co., 192 U. S., 149.

It is now generally held that contracts of fire insurance are not assignable so as to transfer to the assignee the legal title of the original insured unless the insurer consents to such assignment, and this rule prevails even though the policy runs to the insured, his executors, administrators,

and assigns (Carpenter *vs.* Providence Washington Ins. Co., 16 Peters, 495; Sadler's Co. *vs.* Babcock, 2 Atkyns, 554; Washington Fire Ins. Co. *vs.* Kelly, 32 Md., 422; Loring *vs.* Manufacturers' Ins. Co., 8 Gray, 28).

Even though an assignment of the policy, without securing the consent of the insured, would not make the policy void so that the original insured could not recover thereon, nevertheless the assignee would not be able to maintain an action against the insurer to recover the proceeds of such policy in his own name.

While it is true that where, for instance, the owner of a building insures the same payable to the mortgagee, as his "interest may appear," if the amount of the insurance in case of loss exceeds the amount of the damage, both the owner and the mortgagee may sue jointly and obtain a judgment fixing their respective shares (Home Ins. Co. *vs.* Gilman, 112 Indiana, 7), and that both the assured and he to whom the proceeds of the policy are payable may also be joined as plaintiffs in an action thereon (Lasher *vs.* N. W. Nat. Ins. Co., 18 Hun., 98, 102). Nevertheless, where A and B join as plaintiffs in an action against a company on a policy issued to one alone containing no words such as "whom it may concern" or the like, such joinder is a fatal defect (Burgher *vs.* Columbian Ins. Co., 17 Barbour, 27), and in every case it must appear that the policy was made and intended to be in behalf of the person seeking to recover (Pacific Ins. Co. *vs.* Catlett, 4 Wendling, 76).

If the policy sued upon be assignable and an action thereon be maintainable in the name of another than the insured, Antonio Amadeo, it would seem from the record that both the title and the right of action had become lodged in the

Crédito Mercantil. The defendant company has been notified in writing by that concern to such effect (R., 67; Brief Def't in Error, 29).

It is plain that upon the showing made by the record and in the absence of proof that the right and interest of the Crédito Mercantil has been transferred to Lucas Amadeo, any payment to the latter, even though in satisfaction of the judgment under review, would be no bar to a further recovery in a suit by the Crédito Mercantil itself.

3.

To sustain the judgment, in so far as Miller, special master, is concerned, counsel for defendant in error argued that "as the insured was in the business of growing sugar cane and producing the sugar therefrom, it must be presumed that the insurance company knew that the stock of goods would be a constantly changing one, and that the policy covered what is known in the law of insurance as a 'shifting risk'" (Brief Def't in Error, pp. 35, 36).

This suggestion had no part or place in the trial of this cause in the court below and is not reasonably deducible from the terms of the policy itself or from any evidence in the cause thereabouts.

The policy, which was dated September 16, 1884, was for the sum of £1,600 "on stock of sugar and molasses deposited in the sugar manufactory on the estate 'Quebrada Arenas'" and insured the same against fire for the period between November 19, 1884, and November 19, 1885. The insured, Amadeo, testified that "on the night of the 6th or 7th of February, 1885, the stock of sugar and molasses so

insured and in the warehouse aforesaid was entirely destroyed by fire."

There is no evidence in this record tending to show a course of conduct with respect to the business of cane growing or sugar manufacturing in the island of Porto Rico, and there would seem to be no good ground for inferring that when the defendant company insured for a fixed price the stock of sugar and molasses already warehoused on said estate that it either knew or ought to have known that such stock would be a shifting one, and that the insurance would be held applicable to future additions to said stock. It is impossible to infer, either from the words of the policy itself or from the testimony of Amadeo, the insured, that it was intended by either party to the contract of insurance to insure the product of sugar cane, which, at the date of the insurance and at the time when the risk took effect, had neither been deposited in the warehouse nor, indeed, severed from the fields in which it was presumably growing. Whatever may be the law of the French code in such case, it seems to be plain, from the express terms of the Spanish civil code in force in Porto Rico, that crops or "fruits" separated from the estate which produces them prior to the time when the obligation falls due are not covered by a mortgage of realty, and that the only "fruits" which are encompassed by such a mortgage are those "which at the time the obligation falls due are growing on the trees and plants or have already been harvested, but not yet removed or warehoused." (See articles 108, 111, and 112 of the Mortgage Law of Porto Rico of 1893.)

Assuming, for the sake of argument, that the policy sued upon was intended to cover a shifting risk and a changing

stock of sugar and molasses *deposited in the warehouse* described, nevertheless, as it appears from the record itself that at the date of the fire no portion of the mortgage to the Caja de Ahorros had fallen due, it would seem to be plain that no right of action accrued either to the Caja de Ahorros or its assignee or receiver in bankruptcy under that mortgage to recover the proceeds of this policy on the ground that the mortgage covered growing or severed crops not warehoused.

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.
No. 7.

ROYAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

ROBERT MILLER, SPECIAL MASTER OF THE CAJA DE AHORROS, AND LUCAS AMADEO,
Defendants in Error.

Brief on Behalf of Defendants in Error.

FRITZ v. BRIESEN,
Of Counsel for Defendants in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States,

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ROYAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

ROBERT MILLER, Special Master of the Caja de Ahorros, and LUCAS AMADEO,
Defendants in Error.

IN ERROR TO THE DISTR[illegible] COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

The verdict in this case has firmly established the following facts:

That a valid contract of fire insurance was entered into between the plaintiff in error and Antonio José Amadeo, on September 15, 1884 (Rec., p. 77).

That the articles insured, a "stock of sugar and molasses," were destroyed by fire on February 6,

1885, while the policy was still in force (Rec., p. 78).

That the value of the property insured and destroyed, with interest, amounted at the time of the judgment to $12,000 (Rec., p. 30).

That the plaintiff in error was legally obligated to pay to the insured, Antonio José Amadeo, or his assigns, the full amount of the policy, provided the "account" given by the insured to the company within fifteen days after the fire was sufficiently "particular" to comply with clause 6 of the policy (Rec., pp. 78–79).

The defenses to this action, brought up by the assignments of error referred to in the brief of the plaintiff in error, do not bring into question any of the above mentioned facts. They relate to what may be called *quasi*-technical points and may be briefly stated as follows:

That the action was barred by prescription.

That the Judge misinterpreted the legal effect of clause 6 of the policy which provides that a proper inventory of the goods destroyed by fire must be furnished by the insured to the insurance company.

That there was a defect in the pleadings.

That the parties before the Court were not the assigns of the insured.

With regard to this last point it may be here noted that the insured, Antonio José Amadeo, was a witness in this case, and testified that he had disposed of his right of action to the immediate assignors of each of the plaintiffs below (Rec., p. 61).

The Assignments of Error.

The plaintiff in error discusses in his brief six "assignments of error," but, as the majority of these assignments each raise more than one point of law, and as the same general point of law is brought out by several assignments, we shall, for the sake of clearness, discuss separately the various points of law raised in the brief of the plaintiff in error, merely indicating below the numbers and paragraphs of the assignments under which they are brought up.

The brief of the plaintiff in error raises substantially the following five points of law:

1. The prescription of the action [Assignments 2, 3, 5 (Par. 3 and 4) and 6].

2. The correctness of the Judge's instructions on the point of proper notice and inventory by the insured to the insurance company [Assignment 5 (Par. 1 and 2)].

3. The legality of the amendment of the declaration adding Lucas Amadeo as a party plaintiff, and allegations relating to his rights in the premises [Assignments 1 and 2].

4. The right of Lucas Amadeo to recover [Assignments 1 and 2].

5. The right of Robert Miller to recover [Assignments 2 and 3].

POINT 1.

The action was not prescribed by lapse of time.

The fire occurred on February 6, 1885 (Rec., p. 59). For the purpose of this argument we shall not take into consideration the fact that the loss was not payable until a reasonable time after the fire (Judge's Instructions to Jury, Rec., p. 80), but shall assume that the cause of action arose on the day of the fire, February 6, 1885.

The suit was brought on April 23, 1902 (Rec., p. 1), and Lucas Amadeo was added as a party plaintiff on May 13, 1903 (Rec., p. 27). The time that elapsed between the fire and the bringing of the action was therefore less than 18 years, and less than 19 years before the adding of Lucas Amadeo to the record.

We shall show—

(a.) THAT THE LEGAL PERIOD OF PRESCRIPTION APPLICABLE TO THIS CASE IS TWENTY YEARS.

As the Court below was of the opinion that the period of prescription was only fifteen years (Rec., pp. 14, 16), and the plaintiff below was therefore compelled to offer testimony to show that the period of prescription had been interrupted, we shall discuss the testimony relative to this point, particularly as the same is referred to in the brief of the plaintiff in error. Although, therefore, the consideration of this point is unnecessary, in view of the fact that the period of prescription is 20 years, we shall show—

(b.) THAT THE PERIOD OF PRESCRIPTION WAS INTERRUPTED IN 1887 AND 1902.

(a.) *The period of prescription is twenty years:*

The cause of action arose on or shortly after February 6, 1885.

By Section 7 of the Foraker Act (Chap. 191, Laws of 1900; 31 Stat. at L., pp. 77-79) it is provided—

> "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable," &c., &c.

The laws relating to prescription of actions in Porto Rico are contained in the "Civil Code" which went into effect in Porto Rico after July 31, 1889 (War Department Translation of 1899, p. 3 "Royal Decree") and in the "Code of Commerce," which went into effect on May 1, 1886 (War Department Translation of 1899, p. 5, n. 1.).

As these two codes were not in effect in 1885, it is reasonable to assume that the laws in force prior to the adoption of these codes should govern the present case. This assumption is made a certainty by the provisions of the two codes relating to prescription.

The present action is, as admitted by plaintiff in error in its brief, page 39, a "personal action."

The Civil Code provides in its "transitory provisions," Section 4 (p. 255, War Dept. Translation):

> "Actions and rights arising before this code became operative, and not exercised, shall continue with the extension and according to the terms recognized by prior legislation, but shall be subject, with regard to the exercise, duration and proceedings for enforcing them, to the provisions of this code."

It provides further:

> "Art. 1964. A mortgage action prescribes after twenty years, and those which are personal and for which no special term of prescription is fixed, after fifteen years.

> "Article 1939. *Prescription, which began to run before the publication of this code, shall be governed by the prior laws;* but if, after this code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if according to said prior laws a longer period of time may be required."

That is to say, that unless after the Civil Code went into operation, fifteen years shall have elapsed, which is the new period of limitation, a personal action shall not be barred unless it is barred by the statute of prescriptions in force before the Code. As the Code went into effect in 1889 this action could not have prescribed, under this code until 1904, provided that the period of prescription under the prior laws had not elapsed.

This is the construction put upon the Code by the highest court of Spain in the decision of October 3, 1892, reported in Vol. 72, *Jurisprudencia Civil*, Case No. 40, p. 142, holding, on p. 147, that the old law of twenty years was still in force, the cause of action having arisen on July 19, 1870, and suit not having been brought until July 2, 1890, after the adoption of the same Code in Spain in 1889.

It is, therefore, plain that the present case is governed by the law of prescription in force prior to the adoption of the Civil Code in 1889. It is not believed that the Court will hold that the present action is subject to the provisions of the "Code of Commerce," because although fire insurance contracts are governed by the Code of Commerce (Arts. 386 to 415), nevertheless according to Article 380 of the Code it is provided that

> "An insurance contract shall be commercial if the underwriter is a merchant and the contract is at a fixed premium or when the insured pays only a single and continuous amount as the price or compensation of the insurance."

That is to say, an insurance contract is governed by the provisions of the Commercial Code only under certain conditions, not obtaining in this case.

However, in order to avoid any necessity of argument on this point we quote Article 943—

> "The actions which by virtue of this code do not have a fixed period in which to be brought judicially, shall be governed by the provisions of the common law."

There is no special provision for prescription of actions on fire insurance contracts.

Considered under any aspect, therefore, the law of prescription in force in 1885 must govern the present case.

Prior to 1888 the common law of Spain was also the common law of Porto Rico. This is admitted by plaintiff in error in its brief. See also "Historical Outline of the Laws of Spain," G. Schmidt, New Orleans, 1851, which speaks of the "Recopilacion de Indias" of 1680, the Spanish law for the Colonies, and states that where it contains no applicable provision the laws of Spain are to be observed (p. 95).

> "In the meantime Spain, as has already been explained, caused a new collection to be made of its laws, the Novissima Recopilacion. The Royal Cedula, which sanctioned its publication, did not declare that it should be in force in America, yet, as it embodies nearly all the provisions of the Nueva Recopoilacion, declared binding by the laws of the Indias, its authority is unquestionable" (p. 98).

Law 5, Title 8, Book 11 of the Novissima Recopilacion governs the present case. It is quoted by Alcubilla, Dictionario de la Adminstracion Espanola, Madrid, 1886, Vol. 7, page 1053. It may be translated as follows:

> "There prescribes in twenty years the personal action (accion personal) and execution

given upon it, which are not particularly referred to in the prescriptions running a shorter time."

Alcubilla, Vol. 1, page 124, defines "accion personal" as follows (translated):

> "It is that which may be brought against the same person who, because of a contract or an act has obligated himself to give or to do or not to do something; or against the heirs of such a person."

In the following decisions of the Supreme Court of Spain, sitting at Madrid, reported in the "Jurisprudencia Civil," the period of prescription of twenty years has been applied:

> Sentence of Jan. 21, 1863, Vol. 8, p. 54, No. 20;
>
> Sentence of March 17, 1865, Vol. 11, p. 326, No. 92:
>
> Syllabus heading (translated): That personal actions prescribe in twenty years in accordance with Law 5, Title 8, Book 11 of the Novissima Recopilacion.
>
> Sentence of Apr. 8, 1865, Vol. 11, p. 469, No. 139:
>
> "Held, that according to Law 5, Title 8, Book 11 of the Novissima Recopilacion, the personal action and execution given on the same shall prescribe in twenty years and no loss."
>
> Sentence of June 4, 1886, Vol. 60, p. 24, No. *7a:*
>
> "Held, that the action established by the complaint is a personal action which arises from an obligation, and prescribes in twenty years" (p. 27).
>
> Sentence of October 3, 1892, Vol. 72, p. 142, No. 40:
>
> On page 147 the Court held, as Points Third and Fourth, that Law 5, Title 8, Book

11 of the Novissima Recopilacion governed an action on a fire insurance policy. In that case the fire occurred on July 19, 1870. The suit was brought July 2, 1890, after the adoption of the Spanish Civil Code in 1889 (War Dept. Translation of Civil Code for Porto Rico states, p. 8, Royal Decree, "that the Civil Code was approved in Spain July 24, 1889").

See also

Sentence of March 24, 1892, Vol. 71, p. 307 (after the enactment of the Code), and the following:

Sentence of March 9, 1865, Vol. 11, p. 264, No. 75;

Sentence of May 12, 1874, Vol. 30, p. 56, No. 181;

Sentence of April 1, 1884, Vol. 54, p. 548, No. 187;

Sentence of March 12, 1888, Vol. 61, p. 404, No. 89;

Sentence of April 19, 1901, Vol. 91, p. 556, No. 105.

It is clear that the period of prescription which governs the present case is twenty years, and that therefore the action was not prescribed.

However, we shall discuss briefly the question of the testimony relating to the interruption of the statute of prescription, which testimony was made necessary by the erroneous opinion of the Court below that the period of limitation was fifteen years (see exception of plaintiff below to this construction of the law on Rec., p. 83, near bottom of page).

(*b.*) *The period of prescription was interrupted in 1887 and 1902.*

Under the Civil Code, Art. 1973—

> "Prescription of actions is interrupted by their institution before the courts *by extra-judicial claim (reclamacion extra-judicial) of the creditor*, and by any act of acknowledgment of the debt by the creditor."

There is testimony in the case to show that Antonio Amadeo, the insured, in May, 1887, in the presence of Mr. Henry Beste made a demand of Mr. Watlington, the insurance adjuster at New York, for payment of the loss (Rec., pp. 61–62); and that Battistini, an agent of Amadeo, made a demand for the payment of the policy at the insurance company's office in London in 1898 (Rec., p. 63).

Escriche, in his "Diccionario Razonado de Legislacion y Jurisprudencia," Paris, 1852, defines a demand "reclamacion" (p. 1416) as follows (translated):

> "The opposition or contradiction, either oral or written, against some thing as unjust or showing no consent to the same; and the reclaiming, or the recovery or *demand* which one who holds title to a thing makes against him who has possession of the same or retains it."

Under the Code, therefore, a demand is sufficient to interrupt the running of the prescription.

The law formerly permitted the interruption of prescription by demand in the presence of friends. See, for instance, the laws of Las Siete Partidas, Partida 3, Title 29, Law 29, translated as follows by Lislet & Carlton in Laws of Las Siete Partidas, New Orleans, 1820:

> "Likewise we say, that if a man owe another anything which he was bound to give him, and the creditor remained so long without demanding it, that the other began to acquire the debt by prescription; if then the debtor renew the obligation, by executing an act or giving security or a pledge for it; or by

> paying something by way of damages, or as a part of the debt; or by doing anything else of a similar nature, after he had begun to prescribe for it; the prescription will be thereby interrupted and the time lost during which it had to run. *And so we say it would be, if the creditor demand the debt, in the presence of friends or of arbitrators.*"

See decision of the Supreme Court of Spain, of July 14, 1871, No. 282, Vol. 24, Jurisprudencia Civil, page 369, which holds that prescription is interrupted by direct demand.

Watlington was the agent of the company in 1885 when he proceeded to Maunabo to adjust the loss (Rec., p. 60, p. 71). It was proper for the judge to instruct the jury as he did in the third quotation of Assignment 5, that,—

> "Unless the insured, Antonio Amadeo, had notice that his agency as to the loss had ceased, or that it had ended, he had the right in law, and the company, as a matter of law, was still holding him out to the assured as the adjuster to settle that loss, the assured had a right in law to apply to that adjuster and demand of him a settlement of that loss."

Insurance Co. vs. *McCain, 96 U. S., 84, 86:*

> "No company can be allowed to hold out another as its agent and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have the right to rely upon the continuance of his authority until in some way informed of its revocation, The authorities to this effect are numerous. and will be found cited in the treatises of Paley and Story on Agency."

Am. and Eng. Ency. of Law, 2d Ed., Vol. 1, p. 1220, Title "Agency":

> "On the other hand, although notice is given to the agent, the revocation is effective as to third parties only when it is made to

them, and acts of the agent in dealing with third parties without notice are binding on the principal. Where an agent is appointed in a particular business parties dealing with him in that business have the right to rely upon the continuance of his authority until in some way informed of its revocation."

Burlington Insurance Co. v. *Threlkeld, 60 Ark., 539:*

(This was a suit on a fire insurance policy and the question was whether a permit to remove the insured goods to another place, given by the former agents of the company, was a valid permit.)

"On the 18th of July, 1892, the appellant notified Sumpter & Son in writing that their agency was canceled, and that it would not expect any more business from them, and to return its policies and their commission and destroy all other supplies. But it does not appear that the appellee ever had any notice of this revocation until after her property was destroyed by fire. She had a right to presume that the former authority still continued and to act on that presumption until she had notice of its revocation. This much protection was due to her from the Insurance Company. * * * As it is, having acted, presumably in good faith, in reliance upon the former authority of Sumpter & Son, without notice of its revocation, she is entitled to recover upon her policy. Insurance Co. *vs.* McCain, 96 U. S., 84; Commercial Union Assurance Co. *vs.* State, 113 Ind., 331; Tier *vs.* Lampson, 85 Vt., 179; Story on Agency, Sec. 470–471; Parsons on Contracts (8th Ed., bottom pp. 70–72)."

It was therefore proper for the Court to instruct the jury that a demand, if proven, interrupted the prescription; that an offer of settlement, if made, would interrupt the running of the statute; and it was also proper for the Judge to permit evidence on these points to be introduced.

Of course, any error which the Judge may have made in this regard is harmless, as the period of prescription applicable to the present action is twenty years, and as that period had *not* elapsed before the bringing of this suit.

POINT 2.

The instructions of the Court below on the point of proper notice and inventory were correct.

In order properly to understand the instructions of the Judge on this point, it is necessary to read from page 78 of the record, beginning with "The sixth clause in this policy of insurance reads thus" to the end of the third complete paragraph on page 80. This part of the record contains the complete instruction of the Judge on the point of proper notice and inventory. He first states that clause 6 of the policy requires that the insured "must forthwith give notice in writing to the company," and states that "it is an admitted fact in this case that that was done." He then refers to a further provision of clause 6 which requires that the insured must "within fifteen days at latest deliver to the company as particular an account as may be reasonably practical of the several articles or matters insured by this policy, with the estimated value of each of them respectively, having regard to their several values at the time of the fire; and also of the nature and amount of the loss or damage occasioned to each or any such articles or matter and of the interest of the insured therein; and in support thereof give such vouchers, proofs and explanations, and other evidence *as may be reasonably required by or on behalf of the company*, together with, if required, a statutory declara-

tion of the truth of the account," and that, in default thereof, no claim shall be payable.

The Judge then instructs the jury that such a clause or provision is a reasonable and proper one. He further states:

> "There is testimony tending to show that after the company—and when I say 'company' I mean the general agents of the company, because an insurance company is an ideal being and it must necessarily act through agents; that is the only way it can act—there is testimony tending to show that after the company received notice of this fire it notified the insured, Dr. Amadeo, that it would send its agents to look into the matter. There is testimony tending to show (and that is for you to determine whether it was done or not) that they did so; that they sent one man or more—two men it is claimed in this case—that they at least sent a party or agent to look into this matter, and *there is testimony tending to show that the insured, Amadeo, in connection with that party who claimed to be acting for the company, made out a statement of this loss, and that that was furnished to the party that was there acting for the company,* and that was sent to the general agents, and there is testimony tending to show that the proofs of that loss were furnished to the general agents by the insured."

The Judge thereupon states that there is testitimony tending to show that about three months after that fire occurred, or after the proof of loss had been furnished, the agent selected by the company to adjust this loss came to Porto Rico. At that time, after the investigation, the adjuster notified the insured that the proofs of loss were not sufficient. The Judge seems to have been mistaken as to the time, as the adjuster came in April, but he probably had in mind a letter of May 6, 1885, on the part of the company, stating that the documents presented as proofs of the losses were not in due form and were refused as not satisfactory (Rec., p. 65, middle of page).

Now follows the statement, consisting of three sentences, all covered by one exception (Rec., p. 84), only the first and last of which sentences are printed by plaintiff in error in its brief, under Assignment 5, the important, *explanatory* middle sentence being omitted. The entire portion of the instruction excepted to reads as follows:

> "If a person representing the company had been sent there to examine into that matter, and had done so, and in connection with the insured had prepared a statement of that loss, and it had been furnished to the company, then that was all the insured was required to do. *In other words, if an agent representing the company had acted in connection with the insured and had prepared a statement of the loss, and it had been furnished to the company, then if the company within a reasonable time after it could have examined that proof of loss did not make any objection to that proof of loss and inform the insured of it, then that was a waiver, in law, of objection to that proof of loss.* Objections three months or more after the time the agent who was sent there to adjust that loss reported to the company, was not an objection within a reasonable time, especially if it be true that someone representing the company and the insured had in conjunction made out a proof of loss."

The Judge further states (Rec. p. 80):

> "The insurance company is, in law, entitled to a reasonable time within which to examine that statement of loss and see whether it will make any objections to it, and if it makes no objections to it within a reasonable time, then that loss, whatever it may be, becomes due from that period."

The testimony given by the witness Amadeo, on this point, is abstracted as follows at pages 59-60 of the record:

> "He gave evidence that he notified the company's agents, Feddersen & Company, the

next morning after the fire. A commission came from San Juan, sent by the general agents, Feddersen & Company, who made inventories and carried everything with them to San Juan. They came a few days after the fire; they came with the experts whom I do not now recollect, and made examinations; they were appointed by Mr. Jeannot, Senor Lovellet, Mr. Clyde, Don José Ortiz, Mr. Schwartz, also an engineer and masons and carpenters; they took notes and made inventories and investigations about the loss of the fire; they made all of these documents and put them in a sack and carried them to Feddersen & Company, and these documents must be there; these which they made were specific and in detail, and contained all the amounts of the stock of sugar and molasses; they counted the value at the time of the stock of sugar and molasses lost; there was about 180 hogsheads of sugar, 20 hogsheads in pans cooling off, 50 hogsheads of molasses and 50 barrels of sugar; there are two quintals of sugar to a barrel; the hogsheads were big ones and had between 15 and 16 quintals each; in a hogshead of molasses there are from 135 to 140 gallons. More or less these were the statements made at that time, and they were made on that calculation. At that time a quintal of sugar was worth from $2.75 to $3 Mexican money, and a gallon of molasses from 30 to 50 cents Mexican money. I made those statements at the time. The commission from the agents in San Juan carried an invoice and inventories to San Juan; I signed it, and the other men that came from San Juan did also. The two agents were Mr. José Maria Ortiz, a man called Clyde, and another called Schwartz, and some carpenters and other people.

It is submitted that the Court did not err in the instruction excepted to. The original notice of the fire was given promptly, and an inventory, prepared by the company, through its agent, in co-operation with the insured and the experts, was duly signed by the insured and the appraisers.

If the company had any objection to make to the statement prepared by its own agents, it was bound to act promptly. The authorities hereinafter cited fully bear out this argument. In addition thereto the sixth clause of the policy, already quoted in this brief, provides that the necessary vouchers, proofs and explanations and other evidence need be furnished only when "*reasonably* required by or on behalf of the company."

This view is further borne out by the provisions of the articles of the "Code of Commerce," which provides that the experts (who came with the company's agents, and the engineer, masons and carpenters, took notes, and made inventories and investigations about the loss and the fire, as testified to by Amadeo, Rec., p. 59-60), shall investigate the cause of the fire and decide the true value of the goods, and shall decide the amount payable by the company, and that *the company must pay the loss within ten days* after the decision "has been agreed to," and that the decision of the experts shall be the basis for an execution against the underwriters.

> "ART. 406. The appraisement of the damage caused by the fire shall be made by the experts in the manner established in the policy, by an agreement between the parties, in the absence of which said appraisement shall be made in accordance with the provisions of the Law of Civil Procedure.
>
> "ART. 407. The experts shall decide:
>
> 1. The causes of the fire.
> 2. The true value of the goods insured on the day of the fire, before it took place.
> 3. The value of the same goods after the fire, and everything else which may be submitted to their judgment.
>
> "ART. 409. The underwriter shall be obliged to pay the indemnity fixed by the experts within ten days following their decision after it has been agreed to.

In case of delay, the underwriter shall pay the insured the legal interest on the amount due from the date of the termination of said period.

"ART. 410. The decision of the experts shall be the basis for an execution against the underwriter, if said decision was rendered before a notary; and should this not have been done, after an acknowledgment and judicial admission of their signatures and of the truth of the instrument.

"ART. 411. *The insurer shall choose, within the ten days fixed in Article 409*, between indemnifying for the calamity, or repair, rebuild, or replace, according to their nature or character, in whole or in part, the goods insured and destroyed by the fire, if an agreement should be reached."

In other words, the proof of loss furnished by the insured to the insurer was made in the form and manner provided by law, and in the presence and with the co-operation of the company's agents. It is a question whether, under this law, the company had any right to make objection upon the point that the statement was not sufficient, after the decision of the experts had been rendered, but, at any rate, the company must act within a reasonable time, such reasonable time being specifically stated by the Code to be ten days (Art. 411).

Moreover, as the statement made by the experts, the company's agents, with the assistance of the engineer, masons and carpenters and the insured, must be presumed to be correct, the burden of proof was on the company to show that the proof of loss was not such as satisfied the conditions of the policy. The company must be presumed to have the proof of loss in its possession, but did not produce the same, or, at any rate, no copy of it is in the record or seems to have been offered to the jury.

AUTHORITIES.

Wood on Fire Insurance, 2d Ed., Vol. 2, p. 953:

"As to what is reasonable time for a fire insurance company to make known its dissatisfaction with proofs of loss furnished, is a question of law for the court."

Mispelhorn *v.* Farmers' Fire Ins. Co., 58 Md., 473.

Same, Vol. 2, p. 968:

"It seems to be settled beyond dispute that, where there are defects in the proofs of loss, whether formal, substantial, or indeed in any respect, which could have been supplied if specific objections had been made thereto by the underwriters, a failure on their part to object to the proofs upon that ground, or to point out a specific defect, or to call for the information omitted *within a reasonable time*, is considered a waiver, however defective, informal or insufficient such proofs may be."

Same, Vol. 2, p. 979:

"The company may lose its right to object to delay or defect in proof of loss, by express or implied waiver. Thus receiving preliminary proofs of loss, without raising, *within a reasonable time*, objections to defects in them, waives all such defects as might be cured by the insured, in season to preserve his right, if reasonable notice were given."

Young & Co. *v.* Hartford Fire Ins. Co., 45 Iowa, 377.

Hibernia Mut. Fire Ins. Co. *vs.* Meyers, 39 N. J. L., 482:

In this case a delay of forty-five days in objecting to proofs was held unreasonable.

May on Insurance, 4th Ed., Vol. 2, p. 1092, par. 464:

"Although notice of loss must be given, if required, and as required, yet as it is a stipu-

lation in favor of the insurer, it is in their option to waive any delinquency on the part of the insured in this respect. And such a waiver will be inferred from any conduct on the part of the insurers clearly inconsistent with the intention to insist upon the failure to give due notice; as, for instance, * * * *the special examination known to the insured, by the agent of the insurers, and in making a schedule of the property burned.*"

Badger *vs.* Glens Falls Ins. Co., 49 Wis., 389.

Beatty *vs.* Lycoming Ins. Co., 66 Pa. St., 9.

Am. & Eng. Ency. of Law, 2d Ed., Vol. 13, p. 339, Title "Fire Insurance":

"If the insured in good faith attempts to comply with the provisions of the policy as to notice and proofs, the insurer, on receipt of the notice or proofs, must promptly or within a reasonable time object and call attention of the assured specifically to defects, omissions and informalities. *The insurer is bound to know what is required, what constitute defects, and whether the proofs offered are defective; and hence if it does not point out and object to informalities, or does not do so promptly or in a reasonable time,* so as to permit the insured to correct the defects or supply the omissions, or does not specify the defects, informalities or omissions, or specify certain deficiencies without referring to others, *it waives all defects,* informalities or omissions not promptly and specifically pointed out and objected to."

Young & Co. vs. *Hartford Ins. Co., 45 Iowa, 377-383:*

"* * * on the 12th day of June proofs of loss were made out and delivered to Cook & Welling (the company's agents) and the evidence tended to show such proofs were deemed satisfactory to them. No objection was made to the proofs so furnished until

August 21, 1874, at which time a letter was written the assured, making certain objections thereto. Good faith required that, if the proofs were not satisfactory, notice should be given the assured to that effect within at least a reasonable time.

"Objections of this kind are technical and without substantial merit, and the insurer should make such known with reasonable promptitude to the end that they may be perfected if possible.

"* * * The objections to the proofs were made too late and cannot be urged to defeat this action."

Keeney vs. Home Ins. Co., 71 N. Y., 396, 403:

"Objection is made also upon the ground that the proofs of loss did not comply with the requirements of the policy, and that the assured refused to produce their books of account and vouchers for examination. The proofs of loss were served on the defendant on the 15th of August, 1871. They were verified by Clark, one of the firm of Keeney & Clark [the insured]. Intermediate the fire and service of proofs of loss an appraisal had been made of the property damaged, but not destroyed, by appraisers appointed by the mutual agreement of the defendant and other companies having risks on the property and Keeney & Clark. Clark signed the agreement for and acted in behalf of the firm. The evidence tended to show that the defendant knew at this time that the plaintiff had been appointed receiver. The defendant retained the proofs of loss without objection until the 22d day of September, 1871, a period of 38 days, and then notified the firm in writing of certain objections to the proofs, 'and that after proofs of loss shall have been furnished in due form' the company would require the production of their books of account and other vouchers for examination. Some of the objections were frivolous, some were unfounded in fact, and the plaintiff, without furnishing additional or amended proofs, soon after commenced this action. No reason is shown for the delay of

the company in objecting to the proofs furnished."

See also Bodle *vs.* The Chenango County Mutual Ins. Co., 2 N. Y., 53; and Jones *vs.* Howard Ins. Co. of N. Y., 117 N. Y., 103, 108 and 110,

in which latter case it was held that 45 days of unexcused delay in objecting to proofs of loss was a waiver of objection.

POINT 3.

There was no error in permitting Lucas Amadeo to be added as a party plaintiff, and in permitting an amendment of the declaration in order to show the interest of Lucas Amadeo in the subject matter of the suit.

The subject matter of the present suit is the right of action arising out of the contract embodied in the fire insurance policy. It is obvious that all the parties having an interest in the cause of action should have been before the Court as parties plaintiff. Robert Miller as special master, or receiver, of the Caja de Ahorros, was originally the only plaintiff in the case, and the declaration contained allegations tending to show the manner in which the cause of action became vested in the special master. After a demurrer, filed May 14th (Rec., p. 11) had been sustained (Rec., p. 12), and the declaration amended by leave of Court in order to obviate the defects pointed out in the demurrer (Rec., p. 13) the defendant, on May 17, 1902, filed three pleas (Rec., p. 14). Issue was joined by the replication filed May 22, 1902 (Rec., p. 16). In November, 1902, an application for commission to take testimony was filed by

the defendant (Rec., p. 17), and it was not until January 12, 1903, *almost eight months* after issue had been joined, that defendant tendered certain additional pleas (Rec., p. 23), one of which set forth certain alleged rights of the Crédito Mercantil, a bank in San Juan, in and to the proceeds of the fire insurance policy arising out of the purchase of the policy by said bank at a public auction held by order of a Court. This plea was not allowed filed until May 13, 1903 (Rec., p. 26). On the same day the plaintiff filed a replication to the amended plea (Rec., p. 26), and thereafter, on the same day, filed an amended complaint or declaration (Rec., p. 27), the amendment consisting in the addition of Lucas Amadeo as a party plaintiff and of a recital of his title or right in and to the subject matter of the suit. On or before May 18, 1903, the Court ordered the complaint amended, and the defendant was allowed an exception to the ruling of the Court in this regard (Rec., p. 29). The Court at the same time permitted the defendant to file and rely upon certain new defenses set up in certain paragraphs of the amended plea tendered January 12, 1903 (Rec., p. 29; Rec., p. 20).

The amendment to the complaint sets forth that—

> "The said policy of insurance has been given as collateral security on a loan to the Crédito Mercantil, a banking institution, by the insured, J. A. Amadeo, and that afterwards, to wit, after the fire in the year 1890, it was sold by the order of Court, on an attachment writ of the Court of the First Instance of San Juan, Cathedral District, in a public auction, to said Crédito Mercantil, and that afterwards, in the year 1898, said policy was acquired by purchase by Lucas Amadeo, one of the plaintiffs herein, of which he is now a part owner, subject to the mortgage of the insured to the Caga Ahorros" (Rec., p. 27).

The amendment, although rather informal in its language, plainly sets forth that by judicial pro-

ceedings the policy was attached and sold to the Crédito Mercantil, subject to the rights of the prior mortgage creditor, if any such rights exist; and that the same was purchased from the Crédito Mercantil by Lucas Amadeo, one of the plaintiffs. No new cause of action was added. The cause of action was the right to demand a certain sum of money under and by virtue of the contract embodied in the fire insurance policy. This cause of action was put plainly before the Court in the original declaration. When, eight or nine months after issue was joined, it was found by defendant that another party was interested in the cause of action and such interest was set forth in the amended plea (Rec., p. 24), the plaintiff, having evidently made an investigation of the facts, admitted that his original declaration was at fault in so far as all the parties were not before the Court, and was permitted to amend his pleadings under the principles of the old English statute of Jeofails. It was not only proper but necessary that all the parties should be before the Court.

By Sec. 954 of the Revised Statutes it is provided:

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe."

The purpose of this section is

"to prevent hardships and injustice and

that the merits of a cause may be fairly tried" (Eberley *vs.* Moore, 24 How., 147).

The statute grants the fullest power and discretion as to amendments to every Federal court (*In re* Glass, 119 F. R., 509).

The exercise of a power granted under this section when not restrained by positive rules rests wholly in the discretion of the Court (U. S. *vs.* Buford, 8 Pet., 12; Jackson *vs.* Ashton, 10 Pet., 480).

Lange vs. *Union Pacific R. Co., 126 F. R., 338-340* (C. C. A., Eighth Ct., 1903):

> "In granting permission to the company to file the amendatory pleading the Circuit Court was not controlled by the provisions of the Code of Procedure of Colorado. Section 914, Rev. St., provides that the Circuit and District Courts of the United States, in matters of practice, pleadings and forms and modes of proceeding in actions at law shall conform as near as may be to the State practice, but it does not require those courts to follow the State practice in all its subordinate requirements or unimportant details. Those provisions may be rejected which, in the judgment of the Court, would unwisely encumber the administration of the law, or tend to defeat the ends of justice (Railroad Co. *v.* Horst, 93 U. S., 291, 300; Railway Co. *v.* Botsford, 141 U. S., 250, 256; Chappell *v.* United States, 160 U. S., 499, 514). In Shepard *v.* Adams, 168 U. S., 618, the Court said that uniformity of practice was left by acts of Congress to be attained largely through the discretion of the national courts. Moreover, where Congress has legislated generally upon any such subject, the rules of the State practice in respect thereof are superseded, and the extent and limitations of the powers of the courts of the United States are to be found in the congressional enactments, and not in the laws of the States. As was said by this Court in Bowden *v.* Burnham, 59 Fed., 752, the right

of a Federal court to allow amendments is given by Section 954 of the Revised Statutes, and exists quite independently of any State statute. Again, the granting or refusal of leave to make amendments to pleadings is discretionary with the trial Court, and its action is not reviewable except in a case of gross abuse of discretion (Chapman *v.* Barney, 129 U. S., 677; Gormley *v.* Bunyan, 138 U. S., 623; Dietz *v.* Lymer, 61 Fed., 792; Philip Schneider Brewing Co. *v.* American Ice Mach. Co., 77 Fed., 138)."

Oliver vs. *Raymond, 108 F. R., 927 (C. C., E. D. Wis., 1901).*

SYLLABUS: "*There is nothing in the Federal statutes of practice* nor in those of Wisconsin *which precludes a Federal court* sitting in that State *from permitting the amendment of a complaint in an action at law before answer to introduce an additional cause of action of the same nature, and growing out of the same transaction, and which might have been joined with that stated in the original complaint;* and such amendment will be allowed, where it will be in furtherance of justice, and tend to prevent a multiplicity of suits."

This case contains a discussion of a great many Federal authorities on this point.

Union Cent. Life Ins. Co. vs. *Phillips, 102 Fed., 19* (C. C. A., Fifth Ct., 1900):

SYLLABUS: "*All matters of amendment to pleadings,* particularly trial amendments, *are within the discretion of the trial Court, and its action is not reviewable on a writ of error.*"

Chapman v. *Barney, 129 U. S., 677-681:*

In this case the first assignment of error was as follows:

"The Court erred in permitting a new sole plaintiff to be substituted for, and in the place of, the sole original plaintiff."

The Court held:

> "We do not think the first assignment of error well taken. *Amendments are discretionary with the Court below, and not reviewable by this Court* (Mandeville *v.* Wilson, 5 Cranch, 15; Sheehy *v.* Mandeville, 6 Cranch, 253; Walden *v.* Craig, 9 Wheat., 576; Chirac *v.* Reinicker, 11 Wheat., 280; Wright *v.* Hollingsworth, 1 Pet., 165; United States *v.* Buford, 3 Pet,, 12; Matheson *v.* Grant, 2 How., 263; *Ex parte* Bradstreet, 7 Pet., 634).

POINT 4.

Lucas Amadeo had a right to recover.

No testimony was given by the plaintiff below on the point of the title of Lucas Amadeo to a share in the insurance money, as the title of Lucas Amadeo was admitted by the defendant by its not pleading to the amended complaint. The amended complaint (Rec., p. 27), filed May 13, 1903, for the first time introduced into the statement of claim the name of Lucas Amadeo as party plaintiff and the allegations relating to his title or right in the subject matter of the action. As the defendant did not plead to this amended complaint, it admitted the allegations contained therein.

Encyc. Pl. & Pr., Vol. 16, p. 567, Tit. "Pleas at Law":

> "General Rule.—Whatever is not denied by the plea is admitted, as it is a general rule of pleading that a party confesses all such traversable allegations on the opposite side as he does not controvert."

The following allegations of the amended complaint were therefore admitted by the defendant below:

> "That the said policy of insurance has been given as collateral security on a loan to the Credito Mercantil, a banking institution, by the insured, J. A. Amadeo, and that afterwards, to wit, after the fire in the year 1890, it was sold by an order of court on an attachment writ of the Court of the First Instance of San Juan Cathedral District in a public auction to the said Credito Mercantil, and that afterwards, in the year 1896, said policy was acquired by purchase by Lucas Amadeo, one of the plaintiffs herein" (Rec., p. 27).

These facts having been admitted by the defendant below, it was not necessary for the plaintiff below to prove them or to prove such facts as notice, registry or proper delivery of the security, and so on, the legal effect of the various transactions having been alleged and having been admitted.

Especially is this the case, as the pleading not only alleges substantially the very facts already alleged by the defendant below in its amended plea (Rec., p. 24), but alleges them in the same manner. The defense of lack of definiteness comes with bad grace from the defendant, which pleaded substantially the same facts in the same manner.

Moreover, the rule of definiteness in pleading "is satisfied when the allegations are such as fully to inform the defendants of the precise nature of the claim against them" (Encyc. Pl. & Pr., Vol. 6, p. 250, Tit., "Definiteness").

In Dobson *v.* Campbell, 1 Sumn., 319; F. C., 3,945, Judge Story held that "if the declaration upon an assignment of a patent right omit to state that the assignment had been duly recorded in the State Department, the defect is cured by a verdict for the plaintiff" (Syllabus).

It may here be noted that the insurance company

had notice of this transaction at the time it was made (Record, page 67); the defendants' witness Ardrau states that the company received the following notice:

"10th April, 1887, letter from the director of the Sociedad Anónima de Crédito Mercantil San Juan to Messrs. H. Ruffer & Sons, of 39 Lombard street, London, that Mr. Amadeo had deposited policy * * * No. 2647851 in my company in guaranty of a business transaction with the bank" and that Ruffer & Sons had notified the insurance company on December 15, 1888."

It is objected by the plaintiff in error that the Spanish law does not permit the assignment of a chose in action, or of a right under a contract, or the pledging of the same as collateral security. It does not realize that the title of the Crédito Mercantil, the assignor of Lucas Amadeo, arose, *not out of the contract of pledge, but by a purchase at public auction, after the fire.* The policy (that is to say, the right of action arising thereunder) was "*after the fire, in the year 1890,*" "*sold by an order of court on an attachment writ of the Court of the First Instance of San Juan Cathedral District, in a public auction, to the said Crédito Mercantil*" (Rec., p. 27). The validity of the proceeding of the Court *cannot be attacked collaterally.*

As, however, the plaintiff in error has, in its brief, chosen to attack the judicial proceeding collaterally, we shall show that the policy was the proper subject of a contract of pledge.

The Civil Code recognizes the right of assigning a debt or chose in action:

> "ART. 1526. The assignment of a credit, right or action shall produce no effect against a third person but from the time the date is considered fixed, in accordance with Articles 1218 and 1227."
>
> "If said assignment involves real property, from the date of its entry in the register.

"ART. 1527. A debtor who, before having knowledge of the assignment, should pay the creditor, shall be released from the obligation."

Escriche, in his Diccionario Razonado, de Legislacion y Jurisprudencia, Paris, 1852 (p. 49), defines "accion" as follows:

(Translated): "The right to demand a certain thing; and the legal method by which we seek under the law that which is ours or that which is owing to us.

"* * * The action understood in its first sense, that is, as a right which belongs to us to demand something, may be considered movable or immovable according to its subject matter, although it is neither the one nor the other by nature. It is movable if it pertains to the demand of a movable thing, or immovable if it pertains to the demand of an immovable or real thing."

"Credito" is defined (p. 522) as "a debt which some one holds in his favor."

A chose in action relating to a demand for a sum of money under a fire insurance contract, or a right to demand payment in case of loss, is therefor personal or movable property, which "is the object of commerce," and falls, therefore, under Art. 1867 of the Civil Code. This code, while not in effect at the date of the transaction, may be considered as being declaratory of the common law in force at that time:

"ART. 1864: All personal property which is the object of commerce may be given as a pledge, provided it be capable of being possessed."

A chose in action, following, as it does, the person of the owner, is always capable of "*being possessed*" by the owner. A jewel in San Juan cannot be made a pledge in Ponce because, not being in Ponce, it is not "capable of being possessed."

But, as has already been shown, the chose in action in this case was "capable of being possessed" by the insured, and the giving of the policy as collateral security was merely an evidence of the assignment of the claim under the policy.

It does not appear with certainty whether the policy was given as collateral security before or after the fire. The date alleged by the plaintiff in error, September 3, 1884, is manifestly incorrect, as the policy was dated September 15, 1885. The date was probably about April 10, 1887, as on that date notice was sent to Ruffer & Sons, of London, by the Credito Mercantil that policy No. 2647851 had been deposited by Amadeo in guaranty of a business transaction with the bank, the insurance company being notified by H. Ruffer & Sons on December 15, 1887 (Rec., p. 67). No banker would take a fire insurance policy as collateral security unless a loss had already occurred.

Whatever the date may have been, whether before or after the fire, the pledge was valid, as the right under the contract was the subject of pledge. While, under the Civil Code, one may not pledge an article, for instance a house, to which he has no title, he may pledge a right which he possesses, whether by contract or in any other manner.

See on this point, Collins *v.* Darley, 4 Colo., 138, in which a pledge, by a wife, or a life insurance policy on her husband's life, and in her favor *while the husband was living*, was held valid:

> "That a policy of insurance upon the life of the husband for the benefit of the wife, may be assigned or pledged as collateral security by her for the debt of her husband, unless prohibited by local statute is, we think, settled by the great weight of authority."

A prohibition "against an assignment of a policy does not prevent it being pledged as collateral security for a debt" (Wood, Fire Insurance, Sec. 363).

The objection made by the plaintiff in error that the assignment is not valid against the insurance company because of the provision of Art. 1865 of the Code, that "A pledge shall not be effective against a third person nor evidence if its date does not appear in a public instrument," is not well taken. The article has reference to a provision of Article 1857 of the Code, providing that "third persons, strangers to the principal obligation, may secure the latter by pledging or mortgaging their own property."

ART. 1865 is intended to protect people against the fraudulent mortgaging of their property by others, without their consent. That is to say, if A pledges his right of action against B in order to secure a debt owed by C to D, then the pledge shall be ineffective as against A, the owner, unless "evidence of its date appears in a public instrument." It would not, however, relieve B from his liability to pay in case of foreclosure. The less would it relieve him if A pledged the chose in action in order to secure a debt of his own.

It is submitted that, whether the policy was properly and legally pledged, or not, the policy, with the chose in action which it represented, was legally sold by an order of court on an attachment proceeding (Rec., p. 27). Even if the policy had never been pledged, it would have been the proper subject for a writ of attachment proceeding. The allegation that it was "given as collateral security on a loan" is therefore mere surplusage, and must be disregarded. The proceedings of the Court in ordering the policy sold cannot be the subject of collateral attack in this Court. If proceedings could be thus attacked, there would be no end of litigation, nor definiteness of judicial proceedings.

POINT 5.

The plaintiff Miller had a right to recover.

The plaintiff, Robert Miller, is special master (or receiver, Opinion, Rec., p. 12), of the Caja de Ahorros, or Savings Bank, of Ponce, Porto Rico, as evidenced by a certified copy of his appointment introduced in evidence on Rec., p. 54. As such he claims a right to the proceeds of the policy under a certain mortgage from the insured, Antonio José Amadeo, to the Caja de Ahorros. The mortgage is printed in full at Rec., pp. 54 to 58.

The mortgage contains a recitation of the real estate to be mortgaged ((Rec., p. 55), which real estate is a *sugar plantation* (Rec., p. 55, line 6), "all planted in cane" (line 11). It further recites that the mortgagor is indebted to the mortgagee in the sum of $15,036.27 "*which was advanced to him as a loan to attend to the development and keeping of the aforementioned property*" (Rec., p. 56, lines 33 to 35). It provides further (Rec., p. 57) as follows:

> "SIXTH.—As guarantee of this loan the grantor, Don Antonio José Amadeo, constitutes a voluntary mortgage on the property described and *the fruits thereof* for the amount of $15,036.27, which he has received."

In other words, the mortgagor borrowed $15,000 for the purpose of "developing and keeping" the mortgaged realty, and to guarantee the loan mortgages the farm, "and the fruits thereof."

The word "fruits" comprehends the crops—in this case the sugar crop. The mortgage particularly sets forth that the land is "all planted in cane," meaning sugar cane.

Century Dictionary, Tit. "Fruit":

> "1. In a general sense any product of vegetable growth useful to men or animals, as

grapes, figs, corn, cotton, flax, and all cultivated plants. In this comprehensive sense the word is generally used in the plural."

Escriche, Diccionario Razonado de Legislacion y Jurisprudencia, Paris, 1852 (translated):

"FRUITS: In general the word 'fruit' designates that which a thing produces, that is, every accretion, multiplication, increase, emolument, income, or product of any kind, whatever it may be. Fruits are natural, industrial and civil."

The Civil Code speaks of fruits as follows:

"ART. 355. Natural fruits are the spontaneous products of the soil and the brood and all other produce of animals.

"Industrial fruits are those produced by land of any kind by reason of cultivation or labor.

"Civil fruits are rents of buildings, proceeds from leases of lands, and the amount of perpetual life, or other similar incomes."

ART. 357. Fruits which are *in sight or appearing* are considered natural or industrial."

According to the mortgage law of Porto Rico, in force at the time of the making of the mortgage, the following things were mortgagable:

"1. Real property.

"2. Property rights in the realty alienable in accordance with the laws."

(Art. 114 of the law of May, 1880, being also Art. 106 of the Law of 1893, War Dept. Trans., 1899.)

It may here be noted that "real property" may be more properly translated as "immovable goods," the Spanish original being "*bienes immuebles.*" "Immovable property" includes growing crops.

Escriche, Diccionario Razonado, Tit. "Bienes Inmuebles":

> "So are immovable the crops which have not yet been separated from the realty and the fruits hanging upon the trees."

The Civil Code says:

> "ART. 334. Real property consists of
> "1. Lands, buildings, roads and constructions of all kinds adhering to the soil;
> "2. Trees and plants and ungathered products while they are not separated from the land and form an integral part of the real property."

The mortgage law providing generally that "real property" (immovable goods) is mortgagable, provides a certain exception in Article 116 of the Law of 1880, being the same as Article 108 of the Law of 1893:

> "The following are not mortgagable:
> "1. Growing crops and unpaid rents separated from the real estate, which produces them."

Any growing crop, not within the provisions of this exception, is therefore mortgagable, and, therefore a growing crop mortgaged together with the real estate is the proper subject of a mortgage.

The insurance was on "a stock of sugar and molasses deposited in the sugar factory" on the estate of the insured (Rec., p. 50). The insurance was for a period of one year, to wit, from November 19, 1884, to November 19, 1885. As the insured was in the business of growing sugar cane and producing the sugar therefrom, it must be presumed that the insurance company knew that the stock of goods would be a constantly changing one; that as the crop was being harvested and the sugar extracted from the cane the stock would be added to, again to be subtracted from in case of a sale of a part of the stock. In other words, the policy covered

what is known in the law of insurance as a "shift ing risk."

Wood on Fire Insurance, 2d Ed., p. 109, Sec. 46:

> "As all insurers are presumed to be familiar with the usages and incidents of a risk, the contract is always considered with reference thereto. Therefore, when the stock of a manufacturer is insured, although nothing is said in the policy in reference thereto, yet it being understood that the stock insured is to be manufactured and sold, and replaced by other stock, the policy covers the stock on hand at the time of loss, although no part of it was on hand when the policy was made."
>
> Citing Peoria, &c., Ins. Co. *v.* Anapaw, 51 Ill., 383;
>
> Draper *v.* Hudson River Ins. Co., 17 N. Y., 424.

That the "stock of sugar and molasses" destroyed by the fire was a part of the mortgaged crop cannot be doubted. The witness Amadeo testified (Rec., p. 60) that at the time of the fire "there was about 180 hogsheads of sugar, twenty hogsheads (of sugar) in pans cooling off." See pages 39-40, 42 of this brief for an extended discussion of the manner in which sugar is harvested. Whatever other evidence there was on this point has not been printed in the record. The printed record does not purport to be complete, only an abstract of the deposition of the witnesses being given; at any rate, the question was not raised by the defendant below.

Any defect in pleading this fact is cured by the verdict.

Brent's Executors v. *Bank of the Metropolis, 1 Pet.*, 89-93:

> Chief Justice Marshall: "The plaintiffs in error contend that the agreement is not alleged in the declaration, and we admit that

the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note 'at the Bank of the Metropolis' where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration that it was payable there cannot be true, unless there was an agreement of the parties to that effect. *It is an averment which must have been proved at the trial*, or the plaintiff below could not have obtained a verdict and judgment.

"After a verdict it is, we think, sufficient to sustain the judgment."

Upon the destruction of the insured goods the proceeds of any policy of fire insurance go to the mortgagee by operation of law.

"5. Indemnities awarded or due the owner of the mortgaged realty, either for the insurance thereof or for the crops, provided the damage occurred after the creation of the mortgage or on account of the condemnation of the land by right of eminent domain" (Art. 119 of the Law of 1880; Art. 111 of the Law of 1893).

It was not necessary for the Special Master, or for the Savings Bank, to take possession of the mortgaged farm in order to be permitted to sue under the insurance contract. The order of the Court appointed the Special Master "with the power and duty to collect judicially or extra judicially all the assets of the said Caja de Ahorros" (Rec., p. 7). It is not necessary to take possession, or have a sale, of one portion of a mortgaged piece of property, in order to be able to sue for the recovery of another piece of property covered by the same. Even Article 174 of the Mortgage Law, cited by plaintiff in error in its brief, on page 43, states only that "the new owner shall immediately thereafter be placed in judicial possession *should he request it.*"

At any rate, the order of the Court appointing Robert Miller Special Master cannot be attacked collaterally.

Even though the mortgage had not specifically referred to the crops, the plaintiff Miller would have shown a right of action. The mortgage law in force at the time of the making of this mortgage provides as follows:

> "A mortgage extends to natural increase, improvements, growing crops and rents not collected when the obligation falls due, and the value of indemnities allowed or due the owner for insurance on the property mortgaged, or by virtue of condemnation by right of eminent domain" (Art. 116 of the Law of 1880; Art. 110 of the Law of 1893).
>
> "In accordance with the provisions of the preceding article the following shall be considered mortgaged together with the estate, provided they belong to the owner of the estate although they are not mentioned in the contract: * * *
>
> "3. Crops, which at the time the obligation falls due are growing on the trees and plants, or have already been harvested but not yet removed or warehoused. * * *
>
> "5. Indemnities awarded or due the owner of the mortgaged realty, either for the insurance thereof or for the crops, provided the damage occurred after the creation of the mortgage or on account of the condemnation of the land by the right of eminent domain" Art. 119 of the Law of 1880; Art. 111 of the Law of 1893).

The property insured was a "sugar plantation" "all planted in cane" at the time of the mortgage, September 19, 1884 (Rec., p. 55, lines 6, 11). One-half of the mortgage debt became due on February 17, 1885 (Rec., p. 57, line 18). The fire occurred on February 6, 1885 (Rec., p. 59), eleven days before the debt was due.

The "sugar and molasses" destroyed by fire were the "crop" gathered but not yet removed or warehoused within the meaning of the section above quoted.

While in a narrower sense the "crop" of a sugar plantation is sugar cane, yet the real crop is sugar and molasses. The sugar cane contains certain saccharine juices, just as the wheat ear contains kernels of wheat and the cotton plant fibres of cotton. The real crop of the wheat farmer is the wheat kernel, separated from the wheat ear by a process of threshing; and the crop of the cotton planter is cotton separated from the boll by ginning. While the processes of threshing, ginning, and extraction are of course different from one another, they are essentially the same in so far as they are processes necessary for obtaining the crop from the harvest. Just as it has been customary from time immemorial for the wheat grower to thresh his own wheat, and as the cotton is generally picked or ginned on the plantation, so the sugar juices are extracted from the sugar cane usually on the plantation itself. At any rate, on the plantation covered by the mortgage the sugar was extracted in a sugar mill.

The Encyclopedia Britannica, in its article "Sugar," Chap. "Manufacture," states:

> "When mature the canes are cut down close to the ground, the remaining leaves and upper shoot removed, and the stalk *immediately* taken to the mill for crushing."

And further, in the sub-chapter, "Purification of the juice," it says:

> "In the hot climates where sugar canes grow a process of fermentation is almost immediately set up in the impure juices from the canes, causing the formation of invert sugar and later products of fermentation and thereby a serious loss of sugar. *It is therefore essential that with the least possible delay the manufacturing processes should be proceeded with.*"

Molasses is a by-product of the sugar manufacturing process. See article "Molasses," Century Dictionary; article "Sugar" Century Dictionary; and sub-chapter "Boiling Down" in article "Sugar," Ency. Brittanica:

> "The juice, gradually increasing in density, is passed from the one into the other ['pans'] until it reaches the last of the series, the striking teach, in which it is concentrated to the granulating point. The skimmings from these pans are collected and used for making rum. From the striking teach the concentrated juice is removed to shallow coolers in which the crystals form. A few days later it is transferred to hogsheads in the curing house and the molasses is drained away from the crystallized raw sugar into tanks. The sugar so obtained is the 'muscovado' of the sugar refiners and both that and the molasses form their principal raw materials."

From the above quotation it is apparent that, owing to the climatic conditions of the countries in which sugar cane grows, the sugar cane must immediately be worked into sugar and molasses. This is convincing proof that the "crop" of a sugar plantation is "sugar and molasses."

[The Court will take judicial notice of the course of husbandry and agriculture as to the staple crops of the territory of its jurisdiction. Am. & Eng. Encyc. of Law, 2 Ed., Vol. 17, p. 903, Tit. "Judicial Notice." See also Lyon *vs.* Marine, 55 F. R., 964 (C. C. A. 4th Ct.).]

The sugar and molasses destroyed by fire were still on the sugar plantation (Rec., pp. 59–60) and had therefore not as yet been "removed." They were still either in the process of manufacture "in pans cooling off" (Rec., p. 60) or just manufactured. "The sugar and molasses which were destroyed were in the sugar house, the boiler-room, pans and machinery being in one end of the same building" (Rec., p. 62). In other words, the sugar and molasses

were still in the "sugar manufactory," corresponding to the threshing barn of the wheat grower. The mortgage (Rec., p. 55) specifies the buildings on the premises as a "warehouse for sugar, built of wood, with walls which are of iron, a steam engine of 20 horse-power, with its house also built of wood and roofed and lined with iron, a cooper shop built of wood, iron roof, a rum house, with apparatus for distillery, also built of wood, being roofed and enclosed with iron; one dwelling house, all of wood."

The sugar house, containing the boiler-room, pans and machinery, was evidently not the steam engine house, the cooper shop, rum house or dwelling, and must therefore have been the "warehouse" referred to in the mortgage. The word "warehouse," as used by the witness, therefore referred not to a warehouse in the generally accepted sense of the term, but to a sugar manufactory. The fact that the witness referred to the building as a "warehouse" does not make it a warehouse within the sense of the law.

José Gonzales de la Casas, in his Tratado General de Notariado, Madrid, 1877, discussing the mortgage law, adds the following glosse to the above quoted Section 3 of Art. 111.

> "Es decir que han de estar dentro de la propria finca hipotecada, tal como las mieses segadas, pero no levantadas" (p. 760).

which may be translated as follows:

> "That is to say, they (the crops) must still be within the mortgaged farm itself, as, for instance, a harvest gathered but not yet removed."

This seems to indicate that unless the goods have been removed from the farm which produced them they are still within the mortgage, although no reference is made to them in the mortgage instrument. Unless the word "warehouse," therefore, means

any more than a regularly constituted warehouse or storehouse outside of the farm, it means at most "definitely stored away in a storehouse," and not in a part of the factory building, still undergoing the process of threshing, ginning, or extracting. With the exception of 50 barrels of sugar, of two quintals each, valued in all at $300 Mexican, or about $150 United States money, the concentrated juice, in which the crystals have begun to form, were still in the hogsheads in the curing house. The crop had not yet been gathered but was still in a condition of an ungathered crop not yet removed or warehoused.

> "When duly concentrated the syrup is run off into shallow wood coolers, where it concretes; it is then *put into hogsheads with holes in the bottom*, through which the molasses drains off into cisterns below, leaving the sugar in the state known in commerce by the name of raw sugar or muscovado" (Century Dic., Article "Sugar").

The sugar still in the hogsheads "with holes in the bottom" is certainly not sugar stored or warehoused. The portion of the building in which the hogsheads were located was, therefore, not truly speaking, a warehouse or storehouse, but was only a part of the factory. If the sugar had been placed in a separate storehouse or in a cellar of the building it might have been held that the goods had already been stored or warehoused. In Regina *vs.* Hill, 2 M & Rob., 458, a cellar under a shop in which the proprietor kept such goods as he had no occasion to expose for sale was held to be a warehouse, Rolfe, *B.*, saying: "A warehouse, in common parlance, certainly meant a place where a man stored or kept his goods, which were not immediately wanted for sale," and in Regina *vs.* Halladay, 21 Ont. App., 42, it was held "That the cellar in a brewery where beer is stored is a warehouse."

Certainly in these cases the shop and the brewing rooms would not have been considered warehouses or storehouses.

The Spanish law, having abolished chattel mortgages, provided that a crop growing on a mortgaged farm at the time the mortgage falls due, should be considered as a part of the security. In order, however, to protect innocent purchasers of a crop, or to remove any cloud from the title of crops offered for sale, it provided that when the crop had left the farm, or had been definitely stored away, or warehoused, it should not be subject to any implied mortgage. The reason for the law plainly indicates how the law must be construed. There must have been a definite completion of the crop, and a definite storing away, or removal, before the crop can be considered free from the operation of the law.

Should the Court entertain any doubt that the facts above referred to were not as fully and explicitly pleaded in the declaration as they might have been pleaded, it is respectfully submitted that any uncertainty or deficiency has been cured by the verdict in this case. The general rule with regard to the curing of errors by a verdict, as stated by Judge Story, is embodied in the following statement which appears in the Ency. Pl. & Pr., Vol. 22, Tit. "Verdict," p. 939:

> "GENERAL RULE.—Though there is a defect, imperfection, or omission in the pleadings, yet if the issue joined is such as necessarily required on trial proof of the fact so defectively or imperfectly stated or omitted, and without which it is not to be presumed that the jury would have rendered the verdict found, such defect, imperfection, or omission is, as it is expressed, cured by the verdict, or, as Judge Story stated the rule: 'The general principle of law is, that, where a matter is so essentially necessary to be proved, to establish the plaintiff's right to recovery, that the jury could not

be presumed to have found a verdict for him unless it had been proved at the trial, then the omission to state that matter in express terms in the declaration is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend it.'"

Dobson *v.* Campbell, 1 Sumner, 326.

See also the following:

Page 946: "Under the rule above stated, a pleading will always be deemed sufficient after verdict if it contains allegations from which every fact necessary to the maintenance of the action or the establishment of the defense may fairly be inferred."

Addington *v.* Allen, 11 Wend. (N. Y.) 375.

Lincoln *v.* Iron Company, 103 U. S., 412, 415:

"It is a rule of the common law that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured (1 Williams' Saund., 228); or, as it has been tersely put, a verdict cures a defective statement of a title or cause of action, but not the statement of a defective title or cause of action."

It may be said that should the Court hold that one or the other of the parties is not entitled to recover in this case, the proper course for the Court to pursue would be, not to reverse the decision below or to grant a new trial, but to order the Court below to enter judgment in favor of one of the plaintiffs only. This procedure is the one adopted

by the most enlightened jurisdictions. It is the practice adopted by the courts of the State of New York (see Palmer *vs.* Davis, 28 N. Y., 242). It is also the practice of the English courts, Dicey on Parties to Actions, Am. Ed., p. 526:

> "MISJOINDER.—Where an action is brought by A and B, which should be brought by A alone, judgment may be given in favor of such one (or more) of them as are entitled to recover."
>
> Bremner *vs.* Hull, L. R., 1 C. P., 748.

See also Perry *vs.* Mechanics' Mutual Ins. Co., 11 F. R., 478, 482, in which it was held that, because of the liberal provisions of the Code of Rhode Island, "the Court may order any party improperly joined in any action to be stricken out."

While these cases are based upon the codes or practice acts of the States in which the causes of action respectively arose, nevertheless they show that it is to-day deemed no more than just that any party improperly joined be stricken out in order not to put his co-plaintiffs or co-defendants to the unnecessary trouble of another trial.

It is distinctly provided by R. S., 701, that

> "The Supreme Court may affirm, *modify*, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. * * *"

It is submitted that this Court has full power so to modify the judgment of the Court below as to make it a just judgment. The cases above cited show that, if there were a superfluous party, a "just judgment" would be the present judgment in favor of the proper party only.

See Insurance Co. *v.* Boykin, 12 Wall., 433, which holds that the Supreme Court may render the judgment which the Circuit Court should have rendered.

In conclusion it is submitted that, as has already been stated in the introduction to this brief, there is no question that the loss was payable by the plaintiff in error to the insured or his assigns. It has been shown that all the conditions of the policy regarding proper notice have been complied with. The insured, Amadeo, was in court and testified specifically that he had disposed of his property to the defendants in error. He is estopped by his testimony from ever claiming any of the proceeds of the policy. Lucas Amadeo has been shown to be the owner of the proceeds of the policy "subject to the mortgage of the insured to the Caja de Ahorros." If, therefore, Miller, as Special Master, should have no rights whatsoever, then the proceeds of the policy belong entirely to Lucas Amadeo, and judgment should be directed in his favor. We believe, however, that it has been shown that Miller is entitled to recover his share. *Whatever division of the proceeds may have been agreed upon between Amadeo and Miller does not concern the plaintiffs in error.* Any defect in the pleading of the respective rights or shares of the defendants in error in the proceeds of the policy has been cured by verdict.

Am. & Eng. Encyc. of Law, Vol. 22, p. 945, Tit. "Verdict."

> "DEFECTIVE AVERMENT OF TITLE.—If enough is stated to show title in the plaintiff, and with sufficient certainty to enable the court to give judgment, though with less certainty than the case admitted of, and though less is stated than, for the purpose of notice to the adverse party or otherwise, ought to have been stated, the defect will nevertheless be cured by verdict, or the presumption that the omissions in question were supplied, and

the apparent obscurities explained, by evidence given to the jury on the trial" (Gray *v.* James, Pet. (C. C.), 476).

It is submitted that the judgment of the Court below should be affirmed, with costs.

Respectfully submitted.

FRITZ V. BRIESEN,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

No. 7.—October Term, 1905.

Royal Insurance Company, Plaintiff in Error, vs. Robert A. Miller, Special Master of the Caja de Ahorros and Lucas Amadeo. } In error to the District Court of the United States for the District of Porto Rico.

[November 27, 1905.]

Mr. Justice White delivered the opinion of the Court.

Whether a judgment upon a verdict enforcing against the plaintiff in error a contract of fire insurance is erroneous, is the general question for decision. The record is confused, the pleadings involved and the errors assigned numerous. We shall, therefore, at the outset state the contracts with which the controversy is concerned, the pleadings and such uncontroverted facts as are essential to be borne in mind in order to comprehend the issues raised by the assignments of error.

On September 15, 1884, the Royal Insurance Company issued its fire policy in favor of Antonio Amadeo, "estate owner of Quebrada Arenas Maunabo," to the amount of sixteen hundred pounds sterling, "on stock of sugar and molasses deposited in the sugar manufactory on the estate Quebrada Arenas," the risk only to begin two months and four days thereafter, viz., on November 19, 1884, and embracing the period between that date and November 19, 1885.

On September 19, 1884, four days after the taking out of the policy, Antonio Amadeo, the insured, by a notarial act acknowledged that he had received a loan from the Caja de Ahorros, a bank of Ponce, Porto Rico, amounting to $15,036.27, which he obligated himself to repay in two instalments, due in February and March, 1885. It was recited in the act that the money was lent to enable Amadeo "to attend to the developing and keeping of a sugar plantation by him owned." The act also described the plantation as the estate of Quebrada Arenas, gave the quantity of land, which it was declared was all planted in cane, except where used for pasturage and where covered by a sugar manufactory and other appurtenant buildings. A mortgage in favor of the lender was granted by the notarial act upon all the property described "and the fruits thereof."

On the 6th of February, 1885, the sugar manufactory on the estate of Quebrada Arenas was burned, and there was destroyed in the factory sugar and molasses alleged to be equal in value to the sum of the insurance.

It was shown that some of the sugar and molasses was in hogsheads and some was in pans and other apparatus going through the process of manufacture.

Prior to the year 1901, in a court of the island of Porto Rico, the Caja de Ahorros was declared a bankrupt and trustees were appointed and took charge of its assets. In the year 1901 proceedings were begun in the United States District Court for Porto Rico by creditors of the bankrupt against the trustees, and Robert A. Miller was appointed a special master with power to collect the assets of the bankrupt estate. On April 23, 1902, Miller, as special master, commenced this action on the policy. The declaration averred the appointment of Miller and the authority given him to collect the assets of the Caja de Ahorros. The execution of the policy of insurance and mortgage of the plantation was then recited, and it was averred that the Caja de Ahorros as a mortgage creditor was entitled to the avails of the policy of insurance, and therefore had a right to enforce the same.

The declaration was demurred to, first, on the ground that Miller as special master was without authority to sue; and, second, that the action was prescribed, no reference being made to the period of limitation relied upon. A general demurrer was also filed. The court overruled the special demurrers and sustained the general demurrer because of the want of precision in some of the averments of the declaration, which was afterwards remedied by amendment.

To the declaration as amended three pleas were filed, the general issue, a prescription of six years and a prescription of fifteen years. A demurrer was sustained to the plea of six years, joinder was had on the general issue, and a replication was filed setting up various acts, which it was alleged were interruptive of the alleged bar of fifteen-year limitation. Subsequently an additional plea was filled, averring in substance that on September 3, 1884, Antonio Amadeo by way of pledge had assigned the policy of insurance in question to a bank styled the Credito Mercantil, free from any claim of the Caja de Ahorros, the alleged mortgage creditor, and that by judicial proceedings the policy had been sold and purchased by said Credito Mercantil, and as neither the Caja de Ahorros or Miller were the transferees of the Credito Mercantil, the plaintiff was not entitled to recover. A replication was filed denying all the averments of the plea, but admitting that Antonio Amadeo, on a date not named, had deposited the policy as collateral security with the Credito Mercantil, and that that corporation had, after the fire, bought in the policy at a judicial sale by it provoked, and had subsequently transferred the policy to one Lucas Amadeo. Upon this replication issue was joined by the defendant. Subsequently the court allowed Lucas Amadeo to become a party plaintiff and permitted amendments to the declaration to accomplish this result.

These amendments averred the delivery of the policy as collateral security by Antonio Amadeo to the Credito Mercantil, the date not being given, the sale, long after the fire, of the policy under judicial proceedings, and its purchase by the Credito Mercantil, and the subsequent transfer thereof by the Credito Mercantil to Lucas Amadeo. It being besides alleged that by the effect of this transfer Lucas Amadeo became a part owner of the policy "subject to the mortgage of the insured to Caja de Ahorros." No answer was filed to the amended complaint. An exception was, however, noted to the action of the court in permitting Lucas Amadeo to be joined as plaintiff.

The cause came on for trial. After the impanelling of a jury the court allowed the defendant to file six additional pleas, which were to be considered as traversed upon the record, and which were, in substance, as follows: 1st. That the plaintiff was not entitled to recover on the policy because Antonio Amadeo in obtaining the insurance had misdescribed the property or concealed material facts. 2d. That no recovery could be had in favor of the Caja de Ahorros or Miller, because no other person than Antonio Amadeo had any interest in the policy by operation of law, and no other person had any right in the policy by a conventional assignment from the insured, or, if there had been such an assignment, no notice thereof had been given the company, and its consent had not been indorsed on the policy, as required by its terms. 3d. Because Antonio Amadeo had materially increased the risk, without the knowledge and consent of the defendant, after the issue of the policy. 4th. That recovery could not be had, because the insured had not within fifteen days after the fire furnished adequate proof of loss, as required by the policy. 5th. That recovery could not be had, because petroleum and other inflammable oils had been stored upon the premises contrary to the terms of the policy. 6th. Because the claim made by the insured following the fire was false and fraudulent and the fire occurred by the incendiarism of the insured.

At the trial, evidence having been admitted tending to show the bringing by Miller, special master, of a suit in the District Court of the United States to foreclose the mortgage against the plantation executed by Amadeo, it was stipulated by both parties that no sale of the plantation to enforce the mortgage thereon had yet been made. There was a verdict and judgment in favor of Miller, special master, and Lucas Amadeo, for the amount of the policy and interest.

Putting out of view for the present the question of the correctness of the action of the court in allowing Lucas Amadeo to be made a party plaintiff, it results that the issues arising on the trial were all embraced under the following headings:

1. Had the plaintiff capacity to sue, even if a cause of action in favor of the Caja de Ahorros was shown by the declaration? or

2. If Miller had the capacity to sue, did the Caja de Ahorros, as a result of the mortgage, acquire any right in or to the avails of the policy of insurance, and if so, did such right arise by operation of law without the existence of a transfer by the insured of his rights under the policy and the acceptance of such transfer by the company?

3. If the right to enforce the policy obtained by operation of law without assignment by the insured, could the Caja de Ahorros enforce the right by suing on the policy and without previously exhausting its remedies against the other property embraced by the mortgage?

4. Even if the Caja de Ahorros was vested with the rights of the insured and could exert such rights by suit on the policy without previously exhausting the other mortgaged property, had there been such misrepresentations by the insured in taking the policy or such failure after taking it to comply with its terms as precluded the right to recover?

5. In any event, was the action barred by the prescription of fifteen years?

And as the foregoing questions embrace every proposition covered by the errors assigned, except as to the right to join Lucas Amadeo as a party plaintiff, we come to consider the questions in the order stated, before passing on the error alleged to have arisen from an asserted improper joinder of parties.

First. The court found that the appointment of Miller as special master gave him express authority to sue to collect all the assets of the Caja de Ahorros. As the record of the appointment of Miller, although introduced in evidence, does not form a part of the bill of exceptions, we must assume that the ruling of the court was correct, and this being assumed it obviously results that the court below rightly held that the mere designation as special master did not have the effect of depriving Miller of the substantial powers conferred upon him by the decree of the court appointing him.

Second. The proposition that the Caja de Ahorros acquired no right to the policy of insurance in virtue of the mortgage involves two contentions, which require distinct consideration; the one, the proper construction of the policy and the other the operation of the law of Porto Rico upon the policy when properly construed. The first rests upon the assertion that the sugar and molasses covered by the policy was a distinct lot of sugar and molasses, warehoused on the plantation at the time of the issue of the policy, and therefore had no legal relation to a subsequent mortgage of the plantation itself; and the second, that in any event sugar and molasses in the manufactory on the plantation was movable property, not susceptible of being mortgaged under the law of Porto Rico.

The policy covered a "stock of sugar and molasses deposited in the sugar manufactory on the estate 'of Quebrada Arenas." It is true that the word deposited when standing alone might well be considered as refer-

ring to exclusively sugar and molasses then existing, and in the sugar house. But the correctness of this construction is negatived by the fact that the risk under the policy was not to attach at the date of the policy, but in two months and four days thereafter. When this period of the commencement of the risk is considered in connection with the place at which the property insured was situated, viz., a sugar manufactory upon a sugar plantation, on which there was a growing crop, we think the policy must be held to have covered sugar to come into the sugar house on the plantation as the result of the future operation of the factory. And this conclusion is fortified by the indefinite description given of the property insured, which was not of a given number of commercial packages of sugar and molasses, held in a warehouse, but merely a stock of sugar and molasses, a description embracing such stock in whatever form existing, and which might be in the factory at the time the risk attached.

Additional force to the construction we give the policy likewise results from the course of the trial below, since it appears that no objection was noted to the introduction of testimony showing that the property destroyed, for which a claim under the policy had been made by the insured, consisted of sugar and molasses which was in the sugar house as the result of the process of manufacture of the growing crop therein carried on, and moreover no instruction was asked upon the hypothesis that if the property destroyed was of that character it was for that reason alone not covered by the insurance or embraced in the mortgage.

The policy then embracing a stock of sugar and molasses to come into the sugar house on the plantation as the result of the manufacture of the crop which was growing thereon at the time the policy was issued, the question then is, did the mortgage creditor, in virtue of the mortgage, acquire a right to the avails of the policy?

Undoubtedly, as a general rule under the Spanish law in force in Porto Rico at the time of the giving of the mortgage, only real property was the subject of mortgage. (Mortgage Law of 1880, Art. 114; Mortgage Law of 1893, Art. 110, War Department translation.) But by that law a mortgage extended to the "natural increase, improvements, growing crops and rents not collected when the obligation falls due, and the value of indemnities allowed or due the owner for insurance on the property mortgaged or by virtue of condemnation by right of eminent domain." (Mortgage Law of 1880, Art. 118; Mortgage Law of 1893, Art. 110.) And the Mortgage Law of 1880 as well as the Mortgage Law of 1893, moreover provided as follows:

"In accordance with the provisions of the preceding article, the following shall be considered mortgaged together with the estate, provided they belong to the owner of the estate, although they are not mentioned in the contract.

* * * * * *

"3. Crops, which at the time the obligation falls due, are growing on the trees and plants, or have already been harvested, but not yet removed or warehoused.

* * * * * *

"5. Indemnities awarded or due the owner of the mortgage realty, either for the insurance thereof or for the crops, provided the damage occurred after the creation of the mortgage, or on account of condemnation of the land by the right of eminent domain. (Mortgage Law of 1880, Art. 119; Mortgage Law of 1893, Art. 111.)"

To grasp the import of the provisions just quoted a general understanding of the system of mortgages prevailing in the countries governed by the civil law is necessary. By that law the title to mortgaged property remains in the mortgagor and the effect of the mortgage is not, therefore, to deprive the mortgage debtor of his right to administer the property before the obligation falls due. In other words, whilst the mortgage dismembers the ownership by depriving the owner of the right of *abusus*, and therefore divests him of the perfect ownership, it leaves him the imperfect ownership, with the full *usus* and *fructus* of the property mortgaged. Generally, in such countries, and by operation of law, growing crops are included in a mortgage, yet as such crops are naturally thereafter to become movable by their harvesting as an incident of administration and of the *usus* and *fructus*, the right of the owner to realize by gathering the crops and disposing of the same before the mortgage becomes due exists, such gathering and realizing being considered as a mobilization of the crop, therefore taking it beyond the scope of the mortgage. See Code Nap. Art. 2118; P. Pont, Privileges et Hypotheques, v. 1, p. 353, secs. 360, 362. Indeed, under the Napoleon Code this power of the debtor to administer the mortgaged property by an act of administration, done without fraud and in good faith, is, by a writer on that code, asserted to be so complete that his right to produce the mobilization of a crop is deemed to arise by a mere sale of the crop as growing without any actual concurrent severance of the crop from the realty. (Ibid. No. 363.)

It will be observed that, although, generally speaking, the Spanish law, in force in Porto Rico conforms to the theories just stated, it restricts the right of administration and power to mobilize a growing crop to narrower limits than is the case under the Code Napoleon. Thus, by the terms of paragraph 3 of the Code for Porto Rico, the power of the mortgage debtor to administer is controlled by a provision causing crops which are harvested at the time the mortgage falls due to remain subject to the mortgage, despite the harvesting, provided they have not yet been "removed or warehoused." And it will also be observed that paragraph 5 of the same code, as to indemnities arising from insurance on crops, further restricts the power of administration vested in the mortgagor by declaring that, as to indemnities arising from insurance on the crops, the right of the mortgage creditor attaches, even although at the time of the loss the mort-

gage debt had not become due, provided the damage occurred "after the creation of the mortgage." This meaning, plainly resulting from the terms of paragraph 5, is also sustained, as we shall have occasion hereafter to show, by the act governing in Porto Rico concerning the procedure for the enforcement of mortgages, wherein the right is conferred upon the mortgage creditor to impound the avails of insurance upon crops destroyed by fire before the coming due of the obligation, but not collected before such maturity. In other words, the right of the mortgage debtor under the power of administration and by virtue of paragraph 3, to mobilize the crop and thus remove it from the operation of the mortgage, ceases to exist, by the very terms of paragraph 5, upon the destruction by fire of the mortgaged crop, the law treating such destruction as irrevocably fixing the character of the crop as immovable, and causing the indemnity as its representative to be no longer subject to mobilization.

The crop here in question was one of growing cane, whose harvesting depended upon the treatment of the cane at the sugar factory. It is not questioned by either party to the record, and indeed we think it clearly results from the mortgage law to which we have referred, that the crop which is therein subjected to the mortgage is not simply a growing product, but the harvested crop, which in the case of growing sugar cane necessarily includes the result of treating the cane at the sugar house—that is, a crop of sugar and molasses.

From the text of the law we have quoted and the exposition just given of its general import, the following conclusions result:

First. That the growing crop was, by operation of law, included in the mortgage to the Caja de Ahorros, even although the mortgage had not, as it did, expressly purported to embrace the fruits growing upon the mortgaged property.

Second. That the growing crop of cane continued to be affected by the mortgage after its harvest or manufacture into sugar up to the time of its removal or warehousing.

Third. That the rights of the mortgage creditor attached to indemnity for insurance upon the mortgaged property, including the crops, provided the loss occurred after the execution of the mortgage.

Under the construction which we have given the policy of insurance these propositions are decisive in favor of the right of the mortgage creditor, unless it be that the sugar and molasses in question, although it had come from the growing cane and was at the time of the fire in the sugar house as the result of the manufacture from such cane, or was in the process of manufacture, was yet not subject to the rights of the mortgage creditor, because it is to be considered as having been then "warehoused" within the meaning of that word as employed in paragraph 3 of Article 119 of the Law of 1880, which we have quoted. But to so hold would be at one and the

same time to admit and to deny the rights of the mortgage creditor to the avails of the crop and to the indemnity arising from the insurance. This must follow, because it is impossible to conceive of the harvesting of growing sugar cane without at the same time presupposing the existence in the sugar house of sugar and molasses as the result of the harvesting. We construe the warehousing referred to in the provision of the mortgage law in connection with the word "removed," with which it is associated. In other words, we construe it as relating to a distinct act of warehousing, separate from the mere existence of the manufactured product in the sugar house wherein it was made.

As, then, the mortgage by operation of law embraced the crop, and as also by operation of law the mortgage creditor was entitled to the benefits of the indemnity resulting from the insurance, it follows that the right of the mortgage creditor did not depend upon an assignment of the policy, and the contentions upon that subject are without merit.

The doctrine common to countries governed by the civil law is that a mortgage is indivisible. (Code Napoleon, Art. 2114; Paul Pont, Privileges et Hypotheques, vol. 1, p. 319, par. 330 *et seq.*) And we think it is not to be doubted that the law of Spain, in this respect, was not different. (Schmidt, Civil Law of Spain and Mexico, p. 180, Art. 853.) The mortgage being indivisible, the mortgage creditor had an undoubted right to assert the entirety of his mortgage rights against any or all of the property affected by the mortgage.

The contention pressed at bar, that the mortgage creditor had no cause of action to recover the insurance money subject to his mortgage because the law gave the power to proceed to enforce the mortgage by what is known in the Spanish law as *via executiva*, we think is without merit. The existence of the summary remedy does not tend to the implication that the creditor might not, if he elected so to do, proceed *via ordinaria* to obtain judicially a decree recognizing his right of mortgage on the insurance money and enforcing payment of the amount.

This is illustrated by a provision (Art. 161) in the general regulations, put in force in 1893 for the execution of the mortgage law, wherein it is provided that where an indemnity for insurance on property covered by a mortgage becomes due in consequence of the destruction of the property by fire, before the maturity of the mortgage debt, the creditor has a right to compel the deposit of the sum of the insurance to await the period of the maturity of the mortgage obligation. Manifestly if the mortgage creditor be endowed with this right before his mortgage debt becomes due, the right of such creditor to proceed separately to recover the insurance money after his debt becomes due must obtain. This case does not require us to pass upon, and we therefore do not decide whether, under the Spanish law, if there was a junior incumbrancer having some special right in or to

the avails of the insurance money, such junior incumbrancer would be entitled to compel the mortgage creditor to exhaust the other property covered by the mortgage before attempting to irrevocably impute or apply the proceeds of the insurance to the *pro tanto* extinction of the mortgage debt.

Fourth. All the questions concerning alleged misrepresentation in obtaining the policy, of misdescription of the property, of a material increase of the risk of incendiarism, and of the failure to make the due proofs of loss required by the policy, depend for their ultimate determination upon questions of fact, which were concluded adversely to the plaintiff in error by the verdict of the jury. Although they are referred to, as they are not pressed in the brief of the plaintiff in error, we content ourselves with saying that we think the court, as to the matters in question, correctly applied the law to the state of the proof.

Fifth. The fire occurred on February 6, 1885. Suit was brought on April 23, 1902, and Lucas Amadeo was made a party plaintiff on May 13, 1903. In other words, even although the cause of action on the policy only arose within a reasonable time after the making of proofs of loss, more than fifteen years elapsed between the arising of the cause of action and the bringing of this suit. Both parties at bar admit that the action on the policy was personal in its nature, and barred by the term of prescription governing actions of that character.

As we have seen, the defendant (plaintiff in error here) specially pleaded and relied upon the prescription of fifteen years. The applicability of that prescription is based upon article 1964 of the civil code, which provides: "A mortgage action prescribes after twenty years, and those which are personal and for which no special plan of prescription is fixed, after fifteen years."

As both parties concede that there was no special term of prescription fixed by the civil code for an action upon an insurance policy, it follows that the right to sue on the policy was barred by the limitation in question, if that limitation applied. The defendants in error—the plaintiffs below—deny its applicability, and insist that the term of prescription was twenty years, and, moreover, insist that, even if the fifteen-year term applied, the action was not barred, because of interruptions of the prescription asserted to result from the proof as to alleged demands and acknowledgments The trial judge, whilst rejecting the claim of the plaintiffs as to the twenty-year prescription, and maintaining that of the defendant as to the fifteen-year prescription, yet held the action not barred, because of the interruptive effect which the court considered arose from certain demands or acknowledgments, which it was deemed were established by the proof. Before coming to consider the alleged errors on this subject we must determine whether the time of

prescription was fifteen years, as asserted by the defendant and held by the trial court, or twenty years as contended by the plaintiffs.

The loss under the policy occurred in 1885, and the right of action arose, therefore, in that year. The civil code was not then applicable to Porto Rico, not having been extended to that island by Royal Decree until 1889, and the claim that the twenty-year prescription is the only controlling period is based upon that fact. Whilst it is conceded that by the terms of the civil code personal actions were barred by fifteen years, the argument is that by the code actions which arose prior to its promulgation were to be controlled by the prior law, which, it is insisted, was twenty years. The provision of the code relied upon to maintain this proposition is Article 1939, which reads as follows:

"Article 1939. Prescription, which began to run before the publication of this code, shall be governed by the prior laws; but if, after this code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if, according to said prior laws, a longer period of time may be required."

As the fifteen years fixed by the code for the bringing of personal actions had not elapsed between the promulgation of the code and the bringing of this action, it follows that the controversy was not within the terms of the proviso, and therefore the limitation of the cause of action is to be determined, not by the code provision fixing fifteen years, but by the prior law. What was the term of prescription of personal actions under the prior law? is, therefore, the question.

In the absence of express legislation concerning Porto Rico, what was the prior law applicable to that island concerning the limitations of personal actions, must be fixed by ascertaining the period of prescription for personal actions generally prevailing under the Spanish law. (Schmidt, Civil Law of Spain and Mexico, p. 35.) Whilst the general Spanish law, prior to the promulgation of the civil code, is to be derived from a review of the successive Spanish codes, nevertheless the Spanish law prevailing prior to the code is primarily to be found in the code known as the Novisima Recopilacion.

By Law 5, Title VIII, Book II, of the Novisima Recopilacion, it appears that the term of prescription of personal actions was twenty years. (White, New Recopilacion, vol. 1, p. 96.) And from an edition of the Spanish Codes, with concordance and notes, published at Madrid in 1850, under the text of the Novisima Recopilacion in question, (vol. 9, p. 458,) it appears that the limitation of twenty years as to personal actions, as expressed in the text of the Recopilacion, prevailed as early as 1348, in the code known as the Ordenamiento de Alcalá.

Moreover, the Supreme Court of Spain has held, in repeated decisions, that the provision found in the Novisima Recopilacion, above alluded to,

was the general law of Spain on the subject, in force prior to the adoption of the civil code, and that by that law the limitation of personal actions was twenty years. References to a Spanish publication, in which many such decisions are reported, are given in the margin.*

It follows that the court below erred in applying the fifteen-year period of prescription, and that as twenty years had not elapsed from the time the cause of action arose to the bringing of the suit on the policy, the right to sue was not barred by limitation.

But it is insisted that, as the trial judge erred, either in admitting evidence or in the legal effect which he gave to the evidence admitted, concerning acts which were held adequate to interrupt the course of the fifteen-year prescription, there should be a reversal, despite the fact that it is now decided that a longer period of prescription controlled, concerning which the acts of interruption were wholly irrelevant, and therefore not in any way prejudicial. We cannot yield our assent to the proposition. The contention that there should be a reversal because the defendant might have introduced evidence at the trial in support of certain defenses set up in its answer other than prescription, if it had not relied upon the certainty of securing a reversal by this court of any judgment which might be obtained against it, because of what was deemed to be the erroneous rulings as to the interruption of the prescription, is without merit. What term of prescription was applicable to the action was a disputed question at the trial; and we cannot admit that the defendant, by neglecting to make full defense and by speculating on the chances of a verdict in its favor, could secure the right to a reversal of a verdict and judgment against it because of an error of law which in a legal sense occasioned no possible prejudice. And equally without merit is the contention that there would be prejudice if there be not a reversal, because in this court, relying upon the sufficiency of the errors assigned relating to the action of the court concerning the proof of interruption of the fifteen-year prescription, there was a neglect to assign other substantial errors, which it is asserted the trial court committed as to the admissibility of certain evidence and the striking out

*Decisions of the Supreme Court of Spain, sitting at Madrid, reported in the Jurisprudencia Civil, holding the period of prescription of twenty years applicable to personal actions: Sentence of January 21, 1863, vol. 8, p. 54, No. 20; Sentence of March 17, 1865, vol. 11, p. 326, No. 92; Sentence of April 8, 1865, vol. 11, p. 469, No. 139; Sentence of June 4, 1886, vol. 60, p. 24, No. 7a; and Sentence of October 3, 1892, vol. 72, p. 142, No. 40 of the last mentioned sentence. See also Sentence of March 24, 1892, vol. 71, p. 307 (after the enactment of the code;) Sentence of March 9, 1865, vol. 14, p. 264, No. 75; Sentence of May 12, 1874, vol. 30, p. 56, No. 181; Sentence of April 1, 1884, vol. 54, p. 548, No. 137; Sentence of March 12, 1888, vol. 61, p. 404, No. 89; and Sentence of April 19, 1901, vol. 91, p. 556, No. 105.

of various answers of a witness who had given testimony under a commission. As we are at liberty, however, despite the absence of an assignment of error on the subject, to consider a plain error arising on the record, we have given our attention to the subjects referred to, and content ourselves with saying that we think they are devoid of merit.

It remains only to consider the error alleged to have been committed by the trial court in allowing Lucas Amadeo to be made a party plaintiff.

The elementary rule is that amendments are within the sound discretion of the trial court, and are not susceptible of review on error, except for a clear abuse. (*Gormley* v. *Bunyan*, 138 U. S. 623.)

The objection made at the trial to the amendment was that it substituted a new party and an entirely new cause of action. That there was no clear abuse in this case we think results from article 156 of the Law of Civil Procedure for Cuba and Porto Rico, War Department Translation of 1899, providing as follows:

"Causes of action against several persons, or by several persons against one, arising from the same source of title or based upon the same cause of action, may be joined and brought in one action."

The claims of both parties depended upon the contract of insurance. There was no inherent antagonism between the two claims, since the amendment making Lucas Amadeo a party expressly alleged that his rights in and to the policy were subordinate to those of Miller, special master. We consider the provision of the code of procedure above quoted as analogous to the provision in the codes of a number of the States of the Union, by which an action is required to be brought in the name of the real parties in interest, and it is allowable to join as parties plaintiff those having an interest in the recovery sought. (*Firemen's Fund Ins. Co.* v. *Oregon Ry. & Nav. Co.*, 45 Oregon, ; *Fairbanks* v. *San Francisco & Northern Pacific Co.*, 115 Cal. 579; *Home Ins. Co.* v. *Gilman*, 112 Ind. 7; *Winne* v. *Niagara Fire Ins. Co.*, 91 N. Y. 185, 192; *Pratt* v. *Radford*, 52 Wis. 114.)

The contention in the argument that the permitting of Lucas Amadeo to be joined as plaintiff was in legal effect a consolidation of pending causes, which could not be made after answer filed, relying on article 157 of the code of civil procedure, was not made below, since the ground of objection made at the trial was that the amendment substituted a new party and an entirely new cause of action, not that it was merely too late to permit the amendment.

But it is further contended that as the bill of exception states, that no evidence was offered proving or tending to prove any transfer, by the Credito Mercantil of the policy sued on to Lucas Amadeo, therefore there was no proof whatever tending to establish title in Lucas Amadeo to the policy, and hence there must be a reversal. On the state of the

record, however, this objection is not available. The amended declaration making Amadeo a party, and alleging a transfer to him by the Credito Mercantil, was not traversed. It is argued, however, that no express traverse was necessary, because the plea of the general issue filed to the declaration before the allowance of the amendment must be applied to the amendment, and, therefore, the amended declaration should be regarded as having been traversed. Conceding, for the sake of the argument, the rule ordinarily to be as stated, and further conceding that that rule obtained under the procedure in Porto Rico, we do not think that it is here applicable. We say this because the record establishes that the case was tried upon the hypothesis that the transfer to Amadeo by the Credito Mercantil was not disputed, but on the contrary was an admitted fact in the case. Thus, when the court came to charge the jury, it enumerated specifically various issues of fact which they were to determine, and among those issues was not embraced any controversy whatever upon the fact of the transfer by the Credito Mercantil to Lucas Amadeo, as alleged in the amendment to the declaration, and no exception was taken to the action of the court in this particular. Moreover, although various instructions were asked to be given to the jury, on behalf of the defendant, no request was made which in any way intimated that the defendant disputed the fact that Lucas Amadeo had acquired the interest, if any, of the Credito Mercantil in the policy in question, as alleged in the amended declaration. Indeed, we think the record affirmatively establishes that the case was tried below upon the assumption by all the parties that if there was a right to recover on the part of Miller, special master, and Lucas Amadeo had properly been joined as a party plaintiff, a joint recovery was not improper.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.